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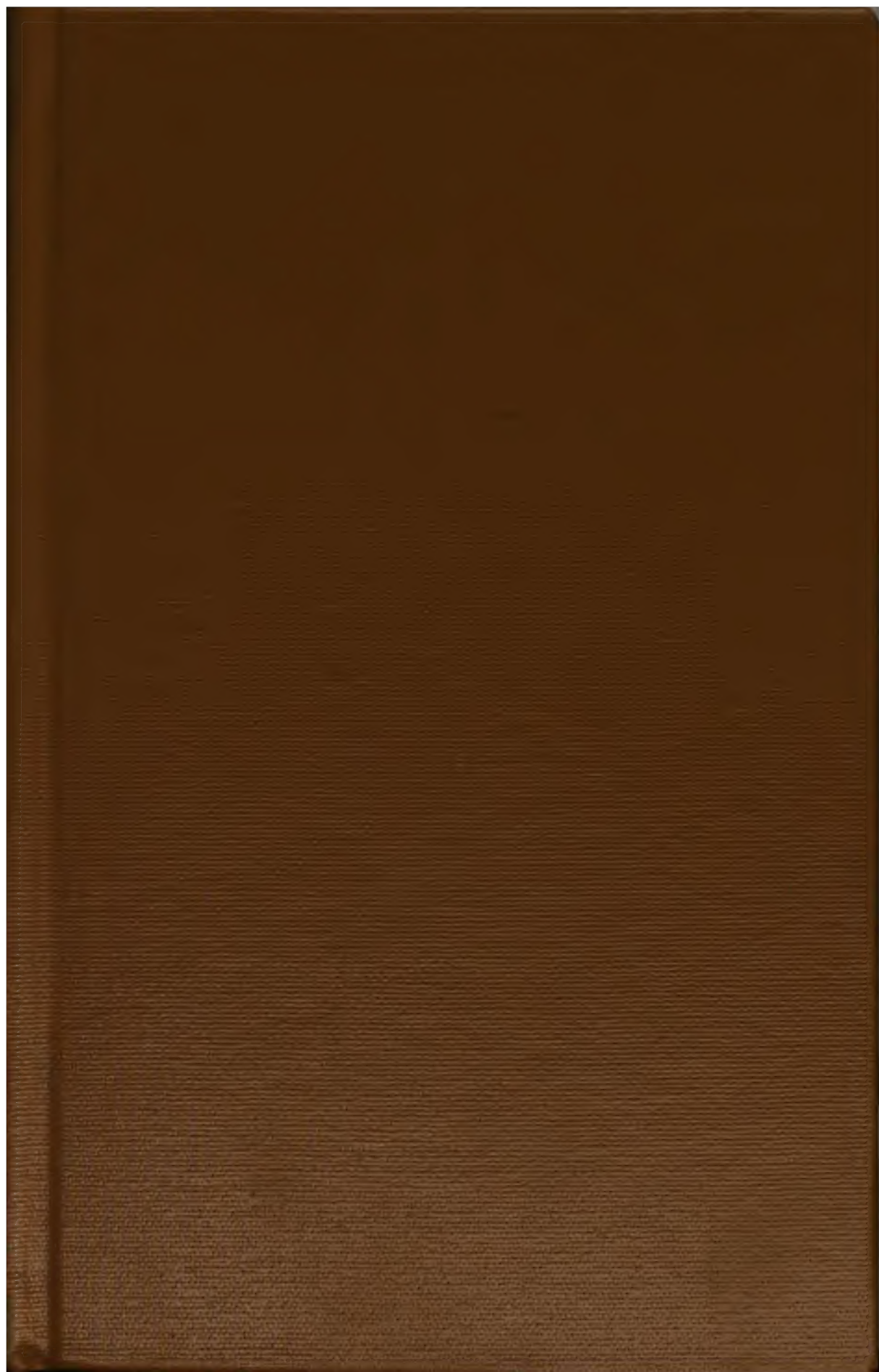
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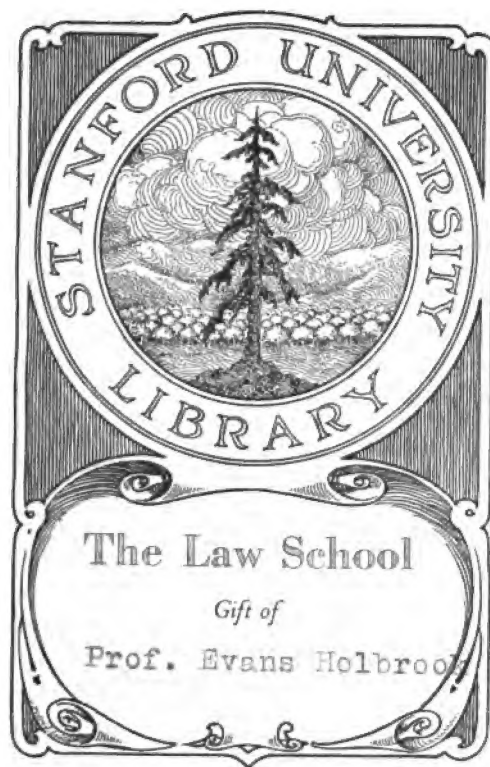
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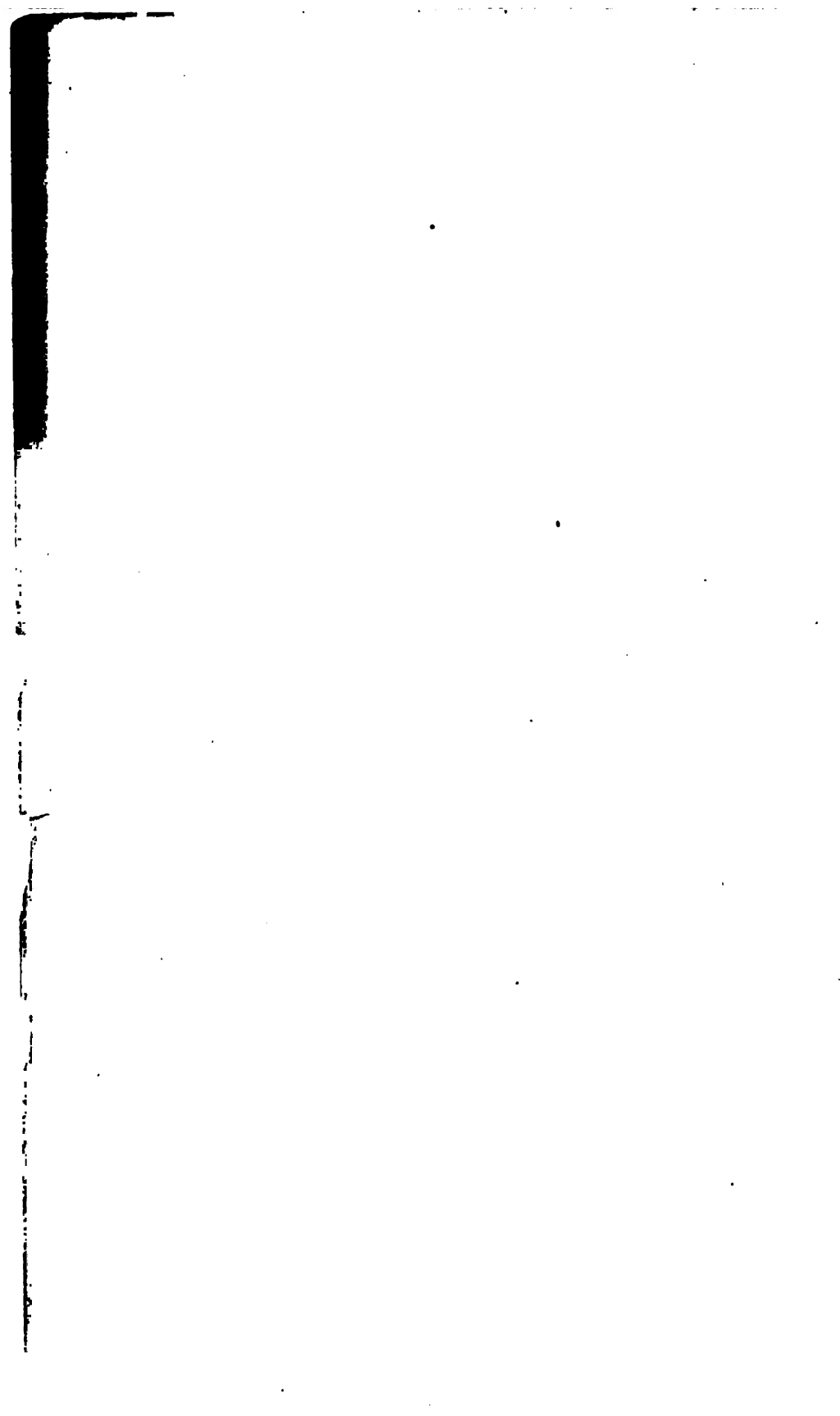
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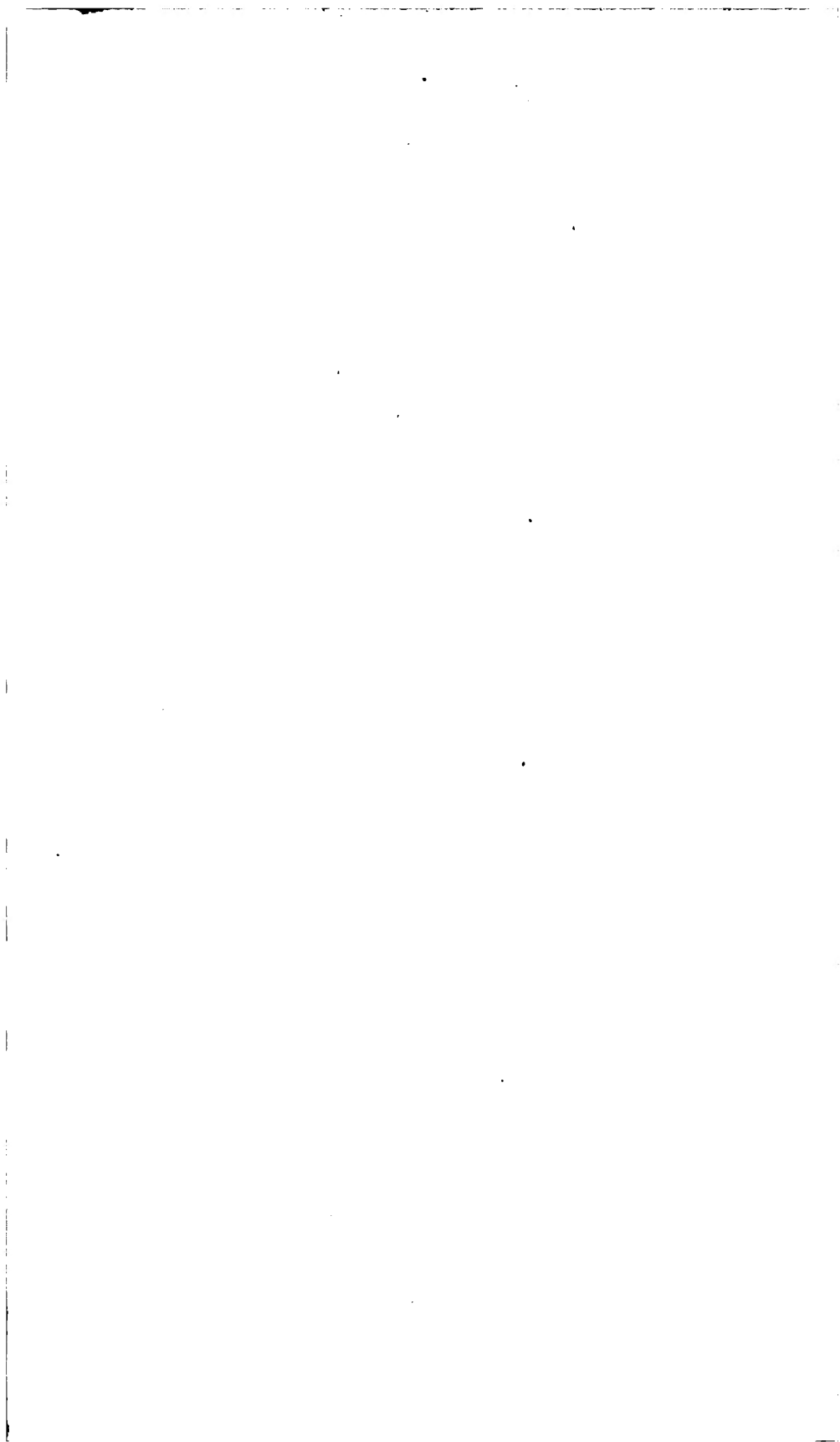
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THE LAW OF TORTS.

THE
LAW OF TORTS
OR
PRIVATE WRONGS.

BY
FRANCIS HILLIARD,
AUTHOR OF "THE LAW OF MORTGAGES," "THE LAW OF VENDORS AND
PURCHASERS," ETC.

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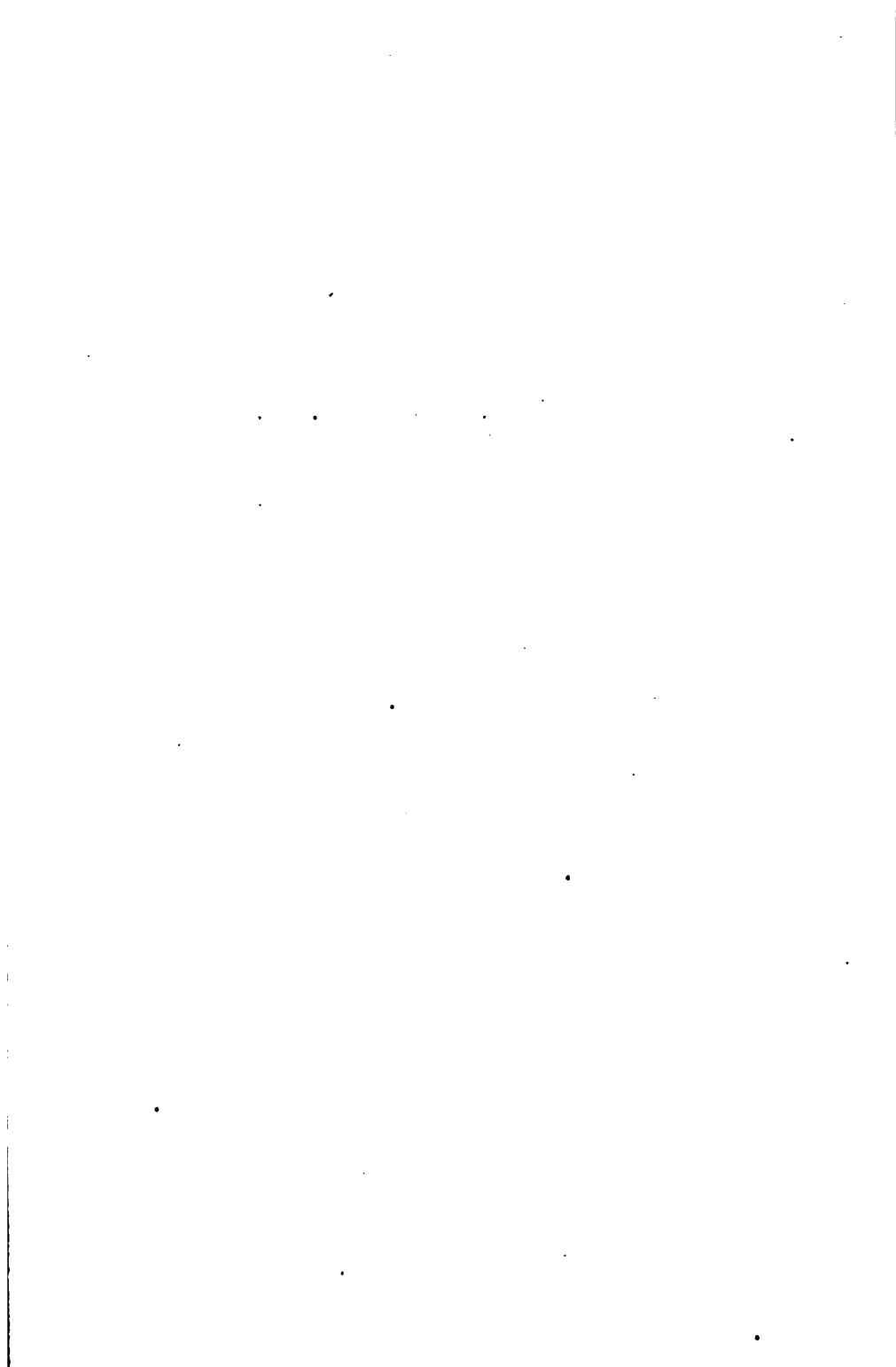
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THE LAW OF TORTS.

CHAPTER XXI.

NUISANCE. — INJURIES TO ANCIENT LIGHTS, AND OTHER PRIVILEGES CONNECTED WITH BUILDINGS.

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| 1. Lights, lawful obstruction of. | 8. Notice. |
| 4. Ancient lights. | 9. Doctrine in the United States. |
| 5. Obstruction by a grantor. | 10. Bill in equity. |
| 6. What is an illegal obstruction of lights. | 11. Parties. |
| 7. Abandonment. | |

§ 1. ANOTHER important incorporeal right, an injury to which falls under the head of nuisance, is that of *lights*.

§ 2. Lights are said to be "a necessary and essential part of the house;"¹ and the law has established definite rules both for the protection and limitation of this valuable privilege.²

§ 3. The owner of a house has a right to make as many windows as he may see fit, although by so doing he may destroy the privacy of his neighbors.³ (a) The opening of such windows is not actionable, but the remedy is by obstructing them, which may lawfully be done:⁴ if the lights are not ancient, or if the neighbor has not acquired a right by grant, occupation, and acquiescence.⁵ And the *motive* for creating such obstruction is immaterial.⁶

§ 4. But where a house has lights which have existed twenty

¹ *Palmer v. Fletcher*, 1 Lev. 122.

² 2 Hill. Real Prop. 75. See *Truscott v. Merchant, &c.* 36 Eng. L. & Eq. 467.

³ *Bacon's Abr.*, Actions, B; 2 Bouv. L. D. 653.

⁴ 3 Camp. 89; *Mahan v. Brown*, 13 Wend. 261; *Thurston v. Hancock*, 12 Mass. 220.

⁵ *Mahan v. Brown*, 13 Wend. 261.

⁶ *Pickard v. Collins*, 23 Barb. 444.

(a) "The making of a window in one's building, on his own land, and overlooking the land of his neighbor, is no encroachment on his neighbor's rights, and therefore cannot be regarded as adverse to him.

The English doctrine is not applicable to the state of things in this country, and would, if applied, work mischievous consequences in our cities and villages." Per *Metcalf, J.*, *Rogers v. Sawin*, 10 Gray, 379.

years, or *ancient lights*; the erection of another which obstructs them is ground of action or injunction.¹ The formal allegation in a suit for the obstruction of lights is said to be, that the house was an ancient house, wherein were ancient windows, through which the light had entered, and had been used to enter from time immemorial.² But the modern rule is, that, although it is not alleged that the house is an ancient one, or that the plaintiff is entitled by prescription to the easement, he may prove an ancient right, if necessary to his case.³ But where one, having a privilege of light through ancient windows, enlarges such windows, he gains no new right, and has no remedy for an obstruction of the ancient lights, which is a necessary consequence of an erection that obstructs the new ones.⁴ (a)

§ 5. In addition to the general right to lights, acquired by prescription or long-continued use, is another right, of similar nature, depending rather upon *estoppel*. If one owning a house and adjoining land sell the former, he cannot *in derogation of his grant* erect upon the latter any building which will obstruct the lights of the house. It is said, the house was granted "with all the easements and delights belonging to it."⁵ And the principle applies as well to a subsequent purchaser of the adjoining land from the vendor of the house, as to such vendor himself.⁶ And if the house and adjoining land are sold at the same time to the plaintiff and defendant, respectively, the former "with all the lights," &c., and described as bounded by a piece of *building-ground*; the defendant can lawfully erect only such a building as had previously stood upon the land, though removed prior to the sale; not a higher building, and creating a greater obstruction of the lights.⁷ (b)

¹ Wright v. Freeman, 5 Harr. & J. 477; 1 Leon. 188; Cro. Eliz. 118; 2 Rolle's Abr. 140 l. *Nusans* G. 10; 9 Co. 58. See Ward v. Neal, 35 Ala. 603.

² 2 Selw. N. P. 1108. See Winship v. Hudspeth, 10 Exch. 5.

³ Story v. Odin, 12 Mass. 157; Gerber v. Grabel, 16 Ill. 217.

⁴ Renshaw v. Bean, 10 Eng. L. & Eq. 417.

⁵ Palmer v. Fletcher, 1 Lev. 122; Story v. Odin, 12 Mass. 157; Cox v. Matthews, 1 Vent. 237; Compton v. Richards, 1 Price, 27; Hubbard v. Town, 33 Vt. 295.

⁶ 1 Lev. 122.

⁷ Swansborough v. Coventry, 9 Bing. 305.

(a) By Stat. 2 & 3 Wm. IV., c. 71, twenty years' use gives a title to lights, unless there be an interruption of one year. Flight v. Thomas, 11 Ad. & Ell. 688.

Although such use be by the verbal permission of a third person. Corporn v. Featherer, 2 Moo. & R. 409. See Salter's, &c.

v. Jay, 3 Ad. & Ell. N. S. 109; Plasterers, &c. v. Parish, &c. 6 Eng. L. & Eq. 481.

(b) A parol agreement was made, by the proprietors of the lots on one side of a street in the city of New York, that the houses to be erected thereon should be set back eight feet from the line of the street,

§ 5 *a.* But where A was party to a deed, which conveyed to B a house with windows, adjoining land of A, and by this deed A conveyed a part of this adjoining land to B; and he also witnessed without objection the erection of the house; held, A might still obstruct B's windows.¹ And where one conveys a tenement adjoining his own, with a stipulation, that, if the grantee shall alter the buildings or erect new ones, he shall not build nearer than a certain line to the tenement of the grantor, but prescribing no limit as to height; the grantee may lawfully increase the height of his building, though he thereby obstructs the grantor's lights.²

§ 6. *Total deprivation* of light is not necessary to sustain an action, but only some *sensible diminution* of light and air, or the free and ample use of it.³ (See p. 6.) And it is immaterial whether the lights are at the extremity of the plaintiff's premises or not.⁴ But no action can be maintained, unless by the obstruction the value of the property is injured. The loss of a look-out or prospect, or the mere taking off of a ray or two, is not sufficient. As affecting the degree of obstruction, the change of angle at which the light enters is a proper subject of evidence.⁵

§ 7. The right to light is acquired by *enjoyment*, and may be lost by a discontinuance of the enjoyment, unless the party at the same time does some act to show an intention of resuming it within a reasonable time. It is said, "Suppose a person to be the owner of a house with ancient lights, which no person has a right to obstruct. If he erect a house, or put up a wall, directly covering his windows, has he not extinguished his light as effectually as if he had blown out his candle?"⁶ Thus the plaintiff's messuage was an ancient house, adjoining which there had formerly been a building, having an ancient window next the lands of the defendant. The former owner of the plaintiff's premises, about seventeen years before, had pulled down this building, and erected

¹ *Blanchard v. Bridges*, 5 Nev. & M. 567.

² *Atkins v. Bordman*, 2 Met. 457.

³ 4 Esp. 69.

⁴ *Cross v. Lewis*, 2 B. & C. 686.

⁵ *Pringle v. Wernham*, 7 C. & P. 377;

Wells v. Ody, Ib. 410; *Parker v. Smith*, 5 Ib. 438. See *Embrey v. Owen*, 4 Eng. L. & Eq. 466.

⁶ Per Nott, J., *Taylor v. Hampton*, 4 M'C. 96.

so as to leave a court-yard of that depth in front of each house; and in pursuance of such agreement a row of large and expensive houses, extending the entire length of the street, was erected and placed back eight feet. Held, that each house and lot was, with respect to others, a servient tenement to the extent of the court-yard; and therefore a subsequent grantee of one of the lots was properly restrained by injunction from building on the space so agreed to be left open. *Tallmadge v. The East River Bank*, 2 Duer, 614.

on its site another with a blank wall, next adjoining the premises of the defendant; who, about three years before the commencement of the action, erected a building next the blank wall of the plaintiff. The plaintiff then opened a window in that wall, in the same place where the ancient window had been in the old building; which the defendant obstructed. Held, an action would not lie.¹ So the privilege of lights may be lost, by a change in the mode or form of using them, which is prejudicial to the adjoining owner, as by altering the nature and use of the building, and changing mere openings into windows.²

§ 8. The use of lights does not bind the adjoining owner, unless he had knowledge of their existence. And the occupation of his land by a tenant is no sufficient ground for implying such knowledge.³ Hence, where lights have been put out and enjoyed without interruption for above twenty years, during the occupation of the opposite premises by a tenant; that will not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact, which is the foundation of presuming a grant against him; and consequently will not conclude a succeeding tenant, in possession under such landlord, from building up against such encroaching lights.⁴ And, inasmuch as the title derived from use or occupancy depends upon a presumed grant, such title will not arise, where, under the circumstances, no grant could be made. Thus, where lights had been enjoyed for more than twenty years, contiguous to land which, within that period, had been glebe land, but was conveyed to a purchaser under St. 55 Geo. III., c. 147; it was held, that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed.⁵

§ 8 a. But strict proof of notice will not be required, in order to establish a title from long-continued use of the lights. Thus the plaintiff and defendant had premises adjoining each other; the plaintiff's house being about four feet within the boundary of her premises. For thirty-eight years there had been windows looking towards the adjoining premises; but, for a long series of years before the defendant purchased them, those premises had

¹ *Moore v. Rawson*, 3 B. & C. 332.

⁴ *Daniel v. North*, 11 E. 372.

² *Garritt v. Sharp*, 3 Ad. & Ell. 325.

⁵ *Barker v. Richardson*, 4 Barn. & Ald.

³ *Daniel v. North*, 11 E. 372. See *Bradbury v. Grimsell*, 2 Wms. Saun. 175, d. e.

579.

belonged to a family living at a distance, and it was not proved that any member of that family had ever seen them, and they had been occupied by the same tenant for the last twenty years. About two years before action brought, the defendant purchased them and built a house, thereby darkening the plaintiff's rooms. Held, the plaintiff was entitled to recover.¹ And it is held that, where the servitude of light in favor of an adjoining estate is *apparent*, and necessary for the use and occupation of the dwelling, the purchaser of the neighboring lot will be held to have known of its existence, and take and hold subject thereto.² (a)

§ 9. In the United States, the qualifications of the title to ancient lights have been so strictly applied, as in great measure to neutralize the rule itself. Thus it is held in New York, that the doctrine of presumption of right by grant or otherwise, as regards the windows of one person overlooking the land of another, so that, by an uninterrupted enjoyment for twenty years, the owner acquires a right of action against his neighbor for stopping the lights by the erection of a building upon his own land; forms no part of the law of that State, not being adapted to the circumstances or existing state of things in this country. Such question of presumption must be submitted to the jury; and the judge is not justified in telling them that they must, but should inform them that they may, presume a grant; except in a plain case where there is no evidence to repel the presumption.³ So it is held, in Maine, that a person may legally erect a building on his own land, immediately adjoining the land of another, and put out windows overlooking the latter; and although he use them for twenty years, he will have no right of action for the obstruction of them.⁴ So in Massachusetts it has been recently decided, that no action lies against the owner of land in a city, for erecting a wall thereupon, which obstructs the access of light and air, as it

¹ Cross v. Lewis, 2 B. & C. 686.

² Durell v. Boisblanc, 1 La. Ann. R. 407.

³ Parker v. Foote, 19 Wend. 309. Acc.

Cherry v. Stein, 11 Md. 1.

⁴ Pierre v. Fernald, 26 Maine, 436.

(a) In a late case it is held, that, the occupiers of contiguous tenements, held under one title, can set up implied grants, from the original owner, of easements not expressly mentioned, only where such easements are apparent and continuous, that is, clearly indicated by the condition of the premises at the time of the division of title. The rule does not apply, if the premises

are then unfinished, and the buildings in a *skeleton* state, so that it is uncertain whether the openings left in the walls were meant as doors or windows, and if as doors, then in what direction and to what extent the ways thereto are designed to be used. So, notwithstanding a plan attached to the grants, if it leave the matter equally uncertain. Glave v. Harding, 3 Hurl. & Nor. 937.

has uninterruptedly existed for twenty years, to windows in the cellar and lower story in a building ten feet within the boundary line of the plaintiff, unless the windows are thereby substantially deprived of light. It is said, "The general rule of the common law, before it was regulated by statute, seems to have been — that uninterrupted enjoyment of air laterally, through and over the land of another, and enjoyed a length of time, created an easement, which could not be disturbed, like that of a right of way, or aqueduct or drain in and over the land of another; though these are distinct in their nature, consisting in actual use and qualified right of occupation in and upon the real property of another, and where such occupation is open and visible, and manifestly adverse. — But even this general law of England was somewhat modified in regard to the densely packed tenements of the largest city in the kingdom, by the custom of London. In many of the States of the Union" it has been held, "that the enjoyment of light and air in a messuage or building, received through windows laterally, over the vacant territory or lower building of an adjoining proprietor, gives to the owner of such building no right to the continuance of such enjoyment. We think the rule is well settled, that, in a city tenement, an easement for light and air, derived from use and enjoyment, or implied grant, can only extend to a reasonable distance, so as to give to the tenement entitled to it such an amount of air and light as is reasonably necessary to the comfortable and useful occupation of the tenement for the purposes of habitation or business; not the amount which under some circumstances, would be agreeable and pleasant, nor the full amount which the tenement has been accustomed to receive; but the amount reasonably necessary. (See p. 3.) The distance will be determined by a just regard to usage, to the habit and mode of building at the place, a just regard to the rights of ownership of real estate, and, generally, the circumstances of the case. In cities closely built and crowded with inhabitants, the limits must be obviously narrower than in rural districts. — The question of reasonableness is a mixed one of fact and law; and where all the facts and circumstances appear, it is a question of law, but in practice it is a question to be passed upon by the jury, under the direction of the Court in matters of law."¹ And still more recent cases decide, that, before the statute of 1852, c. 144, the mere un-

¹ Per Shaw, C. J., *Fifty Associates v. Tudor*, 6 Gray, 259-60.

interrupted continuance for over twenty years of a window with a protecting sill, overlooking another's land, did not necessarily create any easement of light or air.¹ And that no easement of light and air was acquired, by their coming laterally more than twenty years, before the St. of 1852, c. 144, to a window in the wall of a house standing on the boundary line of its owner's estate, although the window swung out on hinges over the adjoining land.² So in Vermont, long continued use of light for the windows of one's building, standing on or near the line of his land, raises no presumption of a grant from the adjoining owner; and the former can maintain no action against the latter for the obstruction of such light by an erection upon his own premises.³ So, in Pennsylvania, no grant of the privilege of light and air over another man's ground can be implied from the fact that such a privilege has been long enjoyed. Nor a contract therefor, on a sale of a house and lot, from the improvements on that and the one adjoining.⁴ So, in New Jersey, an injunction will not be granted, to prevent the defendant from building so as to shut up a window, alleged to be ancient, in the gable-end of the complainant's house, the complainant's house being built on the line of his lot adjoining the defendant's.⁵ And the rule above stated, that one cannot obstruct the lights of an adjoining owner in derogation of his own grant, is not adopted in New York.⁶

§ 10. As in other cases of nuisance, a *bill in equity* may sometimes be maintained for the obstruction of lights. But it is held that no injunction lies against a lessee's obstructing lights in the house leased, unless the injury would be irreparable or incapable of compensation.⁷ Nor a perpetual injunction, in case of a disputed title, until the question has been settled at law.⁸

§ 11. In reference to the *parties* to a suit for the obstruction of lights, it is held that the owner of a house, although not in possession, may maintain an action upon the case for stopping up the windows.⁹ So, on the other hand, a tenant may maintain an action against the landlord for obstructing lights. But damages can only be given for the time which had elapsed when the suit was commenced; not for the whole term.¹⁰

¹ Rogers v. Sawin, 10 Gray, 376.

² Carrig v. Dee, 14 Gray, 583.

³ Hubbard v. Town, 33 Verm. 295.

⁴ Haverstick v. Sipe, 33 Penn. 368.

⁵ King v. Miller, 4 Halst. Ch. 559.

⁶ Myers v. Garmel, 10 Barb. 537.

⁷ Atkins v. Chilson, 7 Met. 398.

⁸ Irving v. Dixon, 9 How. 10.

⁹ Thomlinson v. Brown, Sayer, 216.

¹⁰ Blunt v. McCormick, 3 Denio, 283.

CHAPTER XXII.

NUISANCE.—EXCAVATION; RIGHT OF SUPPORT; PARTY-WALLS, ETC.

§ 1. ANOTHER important topic, connected with *buildings*, and therefore somewhat analogous to the subject of the last chapter, is the right of one owner to take down his building and excavate the soil, or to do the latter act alone; thereby affecting the soil or building of an adjacent owner.

§ 2. It will be seen that the law upon this subject has been somewhat variable, and can hardly now be considered as fully settled. Thus, in an ancient case, the plaintiff declared, that he was seized of a dwelling-house, *lately built*, and that the defendant had a house next adjoining, and, in making a cellar under the latter house, the defendant dug so near the foundation of the plaintiff's house, that he undermined it, and one half of it fell; and judgment was rendered for the plaintiff.¹ The authority of this case, however, has been questioned.² And the prevailing doctrine now is, that a person building a house contiguous to, and adjoining the house of another, may lawfully sink the foundation of his house below that of his neighbor's, and is not liable for any consequential damage, provided he used due care and diligence to prevent injury.³ It is said, "One land-owner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus he cannot, by building a house near the margin of his land, prevent his neighbor from excavating his own land, although it may endanger the house; nor from building on his own land, although it may obstruct windows, unless, indeed, by lapse of time, the adjoining land has become subject to a right analogous to what, in the Roman law, was called a servitude."⁴

¹ *Slingsby v. Barnard*, 1 Rolle, R. 88.

² 12 Mass. 227.

³ *Panton v. Holland*, 19 Johns. 92.

⁴ *Smith v. Kenrick*, 7 Com. B. 565, 566; *Durant v. Palmer*, 5 Dutch. 544.

§ 3. But a distinction is made between an injury to a *house* built upon the land, and an injury to the *soil* itself. It is held, that, although the owner of land adjacent to land of another has no right to remove the earth, and thus withdraw the natural support of his neighbor's soil; and, if he does, is liable for damages, and will be restrained by injunction; yet this doctrine is strictly confined to those cases in which the owner of land has not, by building or otherwise, increased the lateral pressure upon the adjoining soil.¹ And if one owner makes an excavation, so near to the adjoining land of another, that the soil of the latter breaks away, he is responsible for all the injury to the land, and also for the disturbance of the right of way over the land, without proof of carelessness, negligence, or want of skill in making the excavation; but not for injury to buildings placed upon the land.² Thus, where one built a house on his own land within two feet of the boundary line, and, ten years afterwards, the owner of the land adjoining dug so deep into his own land as to endanger the house; and the owner of the house, on that account, left it and took it down; held, no action lay for the damage done to the house, but only for the damages arising from the falling of the natural soil into the pit so dug.³ So where a declaration stated, that A was lawfully possessed of a dwelling-house, adjoining to a dwelling-house of B, and that B dug into the soil and foundation of the last-mentioned house so negligently, and so near to the plaintiff's house, that the wall of the latter house gave way; on demurrer to so much of the declaration as alleged the digging so near, &c., the defendant had judgment. But, if it had appeared that the plaintiff's house was *ancient*, or if the complaint had been, that the digging occasioned a falling in of the soil of the plaintiff, to which no artificial weight had been added; it was doubted whether an action would not have lain.⁴ So A owned a building, the footing of one of the walls of which supported one of the walls of an adjoining house, belonging to B. A, being about to pull down and remove the foundations of his house, notified B of his intention, and used reasonable and ordinary care in the work, but took no measures to preserve B's building, although the nature of the soil required him to lay the new foundation several feet deeper

¹ Farland v. Marshall, 19 Barb. 380; Humphries v. Brogden, 12 Q. B. 739. *Contra*, Smith v. Kenrick, 7 Com. B. 515. And see 1 Ad. & Ell. 493.

² Foley v. Wyeth, 2 Allen, 131.

³ Thurston v. Hancock, 12 Mass. 220.

⁴ Wyatt v. Harrison, 3 B. & Ad. 671.

than the old. Held, A was not liable for an injury hereby caused to B's house.¹ So the owner of a lot, within six feet of Christ's Church, in New York, built more than thirty-eight years before, commenced the erection of a building thereupon, to be six stories high; and was sinking the foundation sixteen feet deep, and ten feet lower than that of the church. The wall of the church, at the corner opposite to which the excavation had been completed, had so settled as to leave a considerable crack. The proprietors of the church filed a bill for injunction, stating these facts, and that the church was in great danger if the work proceeded; but not that the defendant was improving his property in an unreasonable or unusual manner, or with any intention to injure the church, or that the plaintiff had any claim by prescription or grant from the defendant. Upon an application to dissolve the injunction which had been granted, held, although one has a right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, this right does not extend to artificial erections; and the injunction was accordingly dissolved.²

§ 4. But it is to be further remarked, as a qualification of the general rule upon this subject, that while one, who, in digging a foundation upon his own ground, so weakens the earth, as to induce the fall of the wall of another, is not responsible for the loss, unless it was reasonably certain that such would be the effect of the act, and he failed to apprise the other party, that he might use the proper preventives; yet case may be maintained against a person, who by digging away the earth on his own ground, unskillfully, carelessly, and negligently, either causes or accelerates the fall of an adjoining house.³ (a) Thus, in 1803, the plaintiff's

¹ *Massey v. Goyder*, 4 C. & P. 161.

² *Lasala v. Holbrook*, 4 Paige, 169.

³ *Shrieve v. Stokes*, 8 B. Mon. 453;

Dodd v. Holme, 3 Nev. & Man. 739;

Trower v. Chadwick, 3 Bing. N. 334.

(a) Declaration, that the plaintiffs were possessed of a vault adjoining certain walls, and which was of right supported in part by parts of the adjoining walls; that the plaintiffs were of right entitled that their vault should be so supported; and that there were foundations belonging to the vault which the plaintiffs ought to enjoy; yet the defendant wrongfully removed the wall adjoining the plaintiffs' vault, without taking proper precautions to prevent them from giving way, *per quod* the plaintiffs'

vault was damaged by the fall of some materials, which otherwise would not have hurt it, and special loss ensued. Held, to disclose a sufficient right of action.

Plea, as to the not taking precautions to support the vault, that the defendant was not bound by law to take such precautions. Held, ill, as offering an issue of law for a jury, and as containing the traverse of a duty not alleged by the plaintiffs. So likewise, for the same reasons, a plea that the defendant was not bound by law to take

house was built against the pine end wall of the defendant's house, by permission. In 1829, the defendant made an excavation in a careless and unskilful manner, in his own land, near to the wall, by which he weakened it, and consequently injured the house of the plaintiff. Held, an action on the case was maintainable.¹ So where it is alleged and proved, that the defendant so negligently, unskilfully, and improperly dug his own soil, that the plaintiff's house was thereby injured, an action lies; and, although it be shown that the house was infirm, and could, at all events, have stood only a few months, still the plaintiff may recover in proportion to the loss actually suffered, if the jury find that the injury to the house was the consequence of the defendant's negligence; and, in determining the question of negligence, the jury ought to consider the state of the plaintiff's house.²

§ 5. A different rule, however, is applied to injuries caused by the removal of a building or wall adjoining the erection of the plaintiff, alleged to be thereby damaged. Thus it is held, that mere *juxtaposition* does not render it necessary, for a person who pulls down his wall, to give notice of his intention to the owner of an adjoining wall. Nor, if he be ignorant of the existence of the adjoining wall,—as where it is underground,—is he bound to use extraordinary caution in pulling down his own.³ And it has been held, upon a declaration for negligence, in pulling down a house adjoining the plaintiff's house, without shoring up the latter, whereby it fell, that the plaintiff cannot recover, without evidence, from which a grant of right to the support of the adjoining house can be inferred. Nor, upon such a declaration, can the plaintiff insist, that the defendant ought to have given notice of his intention to pull down.⁴ So, in case by a reversioner of a house in Cheapside, against the owner of the adjoining house, for pulling it down without shoring up the plaintiff's house, in consequence whereof it was impaired, and in part fell down; held, first, that upon this declaration the plaintiff could not recover, on the

¹ *Brown v. Windsor*, 1 C. & Jer. 20.

² *Dodd v. Holme*, 1 Ad. & Ell. 493.

³ *Chadwick v. Trower*, 6 Bing. N. 1; 8 Scott, 1; (reversing 3 Bing. N. 334.)

⁴ *Peyton v. Governors, &c.* 4 M. & Ry. 625.

precautions to prevent the foundations of the vault from being weakened. So a plea that the fall of the materials was not occasioned by any act or default of the defend-

ant, or the neglect of any duty by law cast on him. *Trower v. Chadwick*, 3 Bing. N. 334. (This decision, under the circumstances, was reversed. 6 Bing. N. 1.)

ground of the defendant's not having given notice that he was about to pull down his house, that not being alleged as a cause of the injury; secondly, that, as the plaintiff had not alleged any right to have his house supported by the defendants, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it.¹ (a)

¹ *Peyton v. The Mayor*, &c. 9 B. & C. 725.

(a) The plaintiff was the owner of a house built on a hill having a descent toward the west. Next to the plaintiff's house was one belonging to another person, which adjoined a house belonging to the defendants. For upwards of thirty years the three houses had been out of the perpendicular, leaning towards the west. There was no evidence how the leaning originated, but it might have been seen by any person passing in the street. It did not appear when the houses were built, or that there had been any connection between them, either in title, possession, or occupation. The lease of the defendants' house, which was the lowest or westernmost, having expired, and the house being out of repair, the defendants agreed with one R that R should pull down the house and rebuild it, and that the defendants would then grant R a lease. R pulled down the defendants' house. The house adjoining sank further towards the west, and the plaintiff's house, having lost its support, then fell down. Held, that, the defendants' house not adjoining the plaintiff's house, the plaintiff had acquired no right to have his house supported by the defendants' house. *Solomon v. Vintners Co.* 4 Hurl. & Nor. 585.

Some miscellaneous points may be added, in connection with the right of support, and *party-walls*. See *Orman v. Day*, 5 Florida, 385; *Huntington v. Whaley*, Amer. Law Reg. Feb. 1862, p. 244.

Trespass does not lie by one part-owner of a party-wall against the other part-owner. *Wiltshire v. Sidford*, 1 M. & Ry. 404; *Cubitt v. Porter*, Ib. 267.

The common user of a wall, separating adjoining lands which belong to different owners, is *prima facie* evidence that the wall, and the land on which it stands, belong to the owners of the lands, as tenants in common. Hence, where such an ancient wall was pulled down by one of the tenants, with the intention of rebuilding it, and a new wall was built of greater height than the old one, it was held that this was not such a total destruction of the wall, as to entitle one of the tenants to maintain trespass against the other. *Cubitt v. Porter*, 8 B. & Cress. 257.

Upon the subject of party-walls, the following case is reported, though not by formal authority, to have been recently decided in Massachusetts:—See 4 Allen, 147.

Phillips et al. v. Boardman.—This was a motion by the defendant for the dissolution of an injunction issued in the cause. The parties are owners of adjoining estates on Washington Street, between which there is an ancient party-wall, one foot thick, used by them in common for support of the timbers of their respective buildings. The defendant, having taken down his building, and being about to erect a new one, had pared off, to a considerable height, the face of the wall, on his side of it, to the depth of four inches, and was erecting a new wall, a foot thick, which occupies the four inches of the old wall thus removed, and eight inches taken from his own land. In the course of this work, which had reached to the floor of the second story, when the injunction was granted, he had occasionally projected a brick, two inches beyond the face of his new work, so as to reach the centre of the old wall; partly for what support it might render to the remaining portion of the same, but also and principally for the purpose of indicating the division line as claimed by him, and with the avowed intention of breaking up the joint character of the old wall, and of preventing the complainants from building close to the face of his new wall, if, when they should rebuild on their estate, they desired to do so. It appeared from the report of the Master, to whom the case was sent to take the evidence, that the old wall was an ancient wall, still sufficient for the buildings of which it had been the division, and for any buildings such as are commonly built on Washington Street; that, by this paring off, it was materially diminished in capacity for service, and that the new wall was substantially an independent one, affording no material support to the remaining eight inches of the old wall. The injunction granted to the complainants restrained the defendant from proceeding in his work of thus diminishing the old wall, and his Honor refused to dissolve the same, on the ground that the law is clear, where

parties are jointly interested in an ancient party-wall, in a condition to be useful and serviceable, and nothing appears in the origin of the wall to limit or control their rights in it; that neither of them can so deal with it, as to diminish its capacity for service, without the consent of the other, and that this was especially a proper case for the interference of the Court by injunction, because, in addition to the very considerable and irreparable mischief that would be done by the further progress of the defendant, and the difficulty of ascertaining the nature and extent of the damage after the work should be covered in, if the defendant should be allowed to go on and perfect his purpose of destroying the joint party character of the wall, the complainants would not only be deprived of their present enjoyment of it, as a party-wall, but in twenty years, the right itself, if the defendant so long continued his independent wall, would be, without multiplicity of suits, wholly gone.

The principle, that the builder of a new house may take down a party-wall, insufficient for his purposes, and rebuild it at his own expense, is no invasion of the absolute right of property. *Evans v. Jayne*, 23 Penn. 34. See *Jamison v. Duncan*, 12 La. An. 785.

A party-wall built in Kensington district, Philadelphia county, was at first perpendicular, its foundation being equally on land of the plaintiff and the defendant. It afterwards settled, so that it leaned at the top several inches on the side of the defendant. Held, the leaning of the wall did not discharge the defendant from his liability to the plaintiff for one moiety of its value to him, under the act of 1820, incorporating said district; and, as the jury were allowed to deduct the damage to him on account of the encroachment on his premises, the defendant could not complain. *Saner v. Monroe*, 20 Penn. 219.

If an adjoining owner breaks into a party-wall, erected in such district, without notice to the other party, who was the first builder, he thereby waives his right to choose arbitrators, and have a decision as to the value of the wall by regulators as provided for in the act. *Ibid.*

A, owning two adjoining lots, conveyed one of them to B, authorizing him to build a party-wall on the division line, one half on each lot, and covenanting to pay for the same when used. B built such wall and erected a dwelling-house thereon, and then conveyed the house and lot to C. Held, that C, on such wall being used by A's subsequent grantee of the other lot, might recover of A, or, in case of his death, of his executors, one half of the value of the wall, and that C having died intestate after the

use of the wall by A's grantee, the action was properly brought by his administrator. *Burlock v. Peck*, 2 Duer, 90.

To an action of trespass for breaking, &c., a wall of the plaintiff's, bounded on the north by a workshop of the defendant, it was pleaded, that the wall was not the wall of the plaintiff, but a party-wall, standing partly on the plaintiff's and partly on the defendant's land; that the roof of the defendant's workshop rested on the top of the wall on the defendant's side, and that the trespass was committed partly on the plaintiff's half of the wall. Held, the action was not maintained, being brought for *the whole wall*; that, even if the party-wall were treated as two walls, the defendant's part was not part of the workshop, and therefore the description in the declaration, with the abutments, embraced the whole wall; and there was a fatal variance. *Murly v. M'Dermott*, 8 Ad. & Ell. 138.

To an action on the case for prostrating part, and building on part, of a wall, and laying materials on a close, in which wall and close the plaintiff was interested as a reversioner, the defendant pleaded that his own dwelling-house, which he was repairing, accidentally and without his default, fell upon the wall and threw it down; and that afterwards, and before action brought, and within a reasonable time, the defendant, carefully, and at his own expense, erected and built the said wall upon the said close, and in and about such erecting and building necessarily and unavoidably committed the grievances, &c., doing no unnecessary damage, &c., and thereupon and then, to wit, at the times when, &c., at his own expense, repaired all damages sustained by the plaintiff by reason of the grievances, &c. Held, on demurrer, no answer to the action. *Taylor v. Stendall*, 7 Ad. & Ell. N. S. 634.

Where one raising a party-wall *bond fide* intended to comply with the directions of the building act, 14 George III. c. 78, but did not in fact do so, and injured the adjoining house, the owner of which brought trespass; held, that the raising of the wall was to be considered as done in pursuance of the statute, and that the defendant was entitled to the protection given by the one hundredth section. *Pratt v. Hillman*, 4 B. & C. 269.

If one erect two buildings on adjoining lots of his own, with a party-wall between, and subsequently convey to two persons, each has an easement in the party-wall standing on the land of the other for the support of his house. The party disturbing such easement, though for the improvement of his own lot, and with the greatest diligence, is liable therefor. So also any one employed by him. But if the building injured is occupied by a tenant for years, the

owner can recover only for injury to the building, not for interruption of the use and occupation. *Eno v. Del Vecchio*, 6 Duer, 17.

An agreement, authorizing a party-wall to be raised and continued in a straight line with the present division-wall, does not authorize the pulling down of the party-wall, or the diminishing of the area of the adjoining building. *Baughner v. Wilkins*, 16 Md. 35.

Where is an agreement between A and B, owners adjoining, and A covenants with B that he will build a wall, for a certain distance, half on one lot, and half on the other; and, upon his failure so to do, B enters on the ground, and begins to extend the wall to the point agreed; B will not be restrained by injunction. But where the distance to which the wall is to be extended and the proper construction of the covenant are disputed, and the extension will render necessary the cutting away of part of the building, thus causing a permanent injury thereto; a temporary injunction will be issued, to continue until the question of right can be settled. *Rector, &c. v. Keech*, 5 Bosw. 691.

If A builds a wall, under a parol agreement with B, an adjoining owner, that B shall, on using any part of the wall, pay proportionably therefor, a purchaser with notice from B will be liable for any part used by him. *Wickersham v. Orr*, 9 Iowa 253.

The interest of the licensee in this wall, after it has been built, cannot be annulled by any revocation on the part of either the licensor or his grantee with notice. *ib.*

The admission of evidence of a parol agreement in a suit for the value of one-half of a partition-wall, if error, is error without prejudice, and no cause for reversal of judgment. *ib.*

Where two adjoining houses are supported by a party-wall owned in common, and partly on the land of each owner, and which has been used as such for over twenty years; and one without consent of the other, removes the wall, while it is suitable for the purposes for which it was erected, and erects a store on his lot, and a new party-wall: he will be liable to the other for any loss of rent, and the expense of repairs rendered necessary by such removal. *Potter v. White*, 6 Bosw. 644.

A party, who exercises his right of making a wall in common, cannot resist the demand of his neighbor, who erected the wall for one half of its value, although he may have a claim to the soil upon which more than one half of the wall was built. *Davis v. Grailhe*, 14 La. An. 338.

The Iowa St. January 24, 1855, respecting party-walls, is declaratory of the common law. *Zugenbuhler v. Gilliam*, 3 Clarke, 391.

The owner of one of two vacant lots

may build his wall half on his neighbor's land, and, if that neighbor subsequently uses the wall, he makes it a party-wall, and becomes liable to pay for his share. *ib.*

The plaintiff and defendant occupied adjoining plots of ground, divided by a wall, of which they were tenants in common. There was a shed in the defendant's ground contiguous to the wall, the roof of which rested on the top of the wall across its whole width. The defendant took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the top, and built a wash-house contiguous to the wall, where the shed had stood, the roof of the wash-house occupying the whole width of the top of the wall, and he let a stone into the wall, with an inscription on it, stating that the wall and the land on which it stood belonged to him. Held, on these facts, a jury might find an actual ouster by the defendant of the plaintiff from the possession of the wall, which would constitute a trespass, upon which the plaintiff might maintain an action against the defendant. *Stedman v. Smith*, 8 Ellis & B. 1.

A and B built houses at the same time, and built a partition-wall on the division line at joint expense, without any agreement as to its maintenance. After a peaceful occupancy of twenty-one years, A's grantee notified B's grantee, that he was about to pull down half the partition-wall, in order to erect a better building, and, against the objections of the latter, the former pulled down the half on his land, using due care, notwithstanding which, the other's building fell. Held, there was no cause of action. *Hieatt v. Morris*, 10 Ohio, (N. S.) 523.

Some miscellaneous examples may be added of injuries to dwelling-houses.

An action on the case lies for not repairing the partition-wall of a privy, whereby filth ran into the plaintiff's cellar. *Tenant v. Golding*, 1 Salk. 22, 360.

A declaration for causing water to flow through pipes near the foundation of the plaintiff's house, so that the water sapped the foundation of the house, is unexceptionable after verdict, although it does not expressly state that the pipes were the defendant's, that he laid them there, or that he is bound to repair them. In such action the plaintiff need not set forth his title to his house; it is sufficient for him to show that he was possessed of it. *Hoare v. Dickinson*, 2 Ld. Raym. 1568.

A reversioner may maintain an action against one who erects upon his house eaves and a pipe, overhanging and conducting water upon land occupied by a tenant of the plaintiff. *Tucker v. Newman*, 4 Per. & Dav. 14; 11 Ad. & Ell. 40.

Case lies for building a house which overhangs the land of another, and causes the rain to fall upon and injure it. Penruddock's case, 5 Co. 100; Bowry v. Pope, 1 Leon. 168.

Or for an erection so situated as to throw water on a roof; without proving any actual instance of such injury. *Fay v. Prentice*, 1 Com. B. 828.

There are some other incorporeal rights relating to lands, which may be the subject

of tort or wrong, such as *ways*, *commons*, *markets*, and *ferries*. Most of them, however, have given rise to very few decided cases, in reference to the particular point of *actionable injury*; and, with respect to the *right of way*, as it is for the most part set up rather for a defence than a ground of suit, and, moreover, its obstruction is one of the most familiar instances of *nuisance*, strictly so called, it does not require further distinct consideration. (See *Torts and Crimes*, i. 67; *Nuisance*, chap. 19, § 8; *Trespass*, chap. 24.)

CHAPTER XXIII.

PATENTS, COPYRIGHTS, ETC.

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| <ul style="list-style-type: none"> 1. Nature, definition, and statutory regulations of patents. 8. <i>Novelty</i> and <i>utility</i>, necessary to a patent — novelty. 11. <i>Utility</i>. 12. <i>Practical application</i> necessary. 13. Distinction between a <i>machine</i> and a <i>process</i>. 14. Patent for an <i>improvement</i>. 15. For distinct inventions. 16. For a <i>mode of manufacturing</i>, and the thing manufactured. 17. <i>Joint</i> inventors. 18. Infringement of a patent. 23. Specification. 27. Transfer of a patent. 36. Injunctions. 38. Account. 39. Practice in equity. 43. Damages. | <ul style="list-style-type: none"> 44. Mode of trial, evidence, &c. 47. Miscellaneous points of practice. 53. Copyright, at common law and by statute. 54. Nature and extent of the privilege; how infringed. 55. Abridgments. 56. Translations. 57. Price current. 58. Charts, engravings, &c. 59. Law Reports, marginal notes, dramatic compositions. 60. Mutual rights of authors and publishers. 63. Registration. 64. Assignment. 66. Remedies — injunction, account, penalties, &c. 68. Protection of manuscripts, &c. 71. <i>Trade-marks</i>. |
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§ 1. ANOTHER subject of the wrong termed *nuisance*, is a *patent*; an *incorporeal* right, a violation of which consists of acts in their nature *indirectly and consequentially injurious*, and is therefore the proper subject of an action on the case, and not of an action of trespass.¹

§ 2. A patent is a grant by the State of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend, an invention.² And the following summary view of the general statutory regulations upon the subject is given by Chancellor Kent: "A patent-office is now attached to the department of state, and a commissioner of patents appointed. Applications for patents are to be made in writing to the commissioner, by any person having discovered or invented any new and useful art, machine, manufacture or composition of matter, not known or used by others before his discovery or invention thereof, and not at the time of his application for a patent, in public use or on sale,

¹ *Stein v. Goddard*, 1 McAll. 82; *Atwill v. Ferrett*, 2 Blatch. 39.

² *Phillips on Patents*, 2.

with his consent or allowance, as the inventor or discoverer. The applicant must deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using, and compounding the same, in full, clear, and exact terms, avoiding unnecessary prolixity, so as to enable any person skilled in the art or science to which it appertains, or is most nearly connected, to make, construct, compound, and use the same; and he must, in the case of a machine, fully explain the principle and the application of it, by which it may be distinguished from other inventions; and he must particularly specify the part, improvement, or combination, which he claims as his own invention or discovery. He must accompany the same with drawings and written references, where the nature of the case admits of drawings, or specimens of ingredients, and of the composition of matter sufficient in quantity for the purpose of experiment, where the invention or discovery is of a composition of matter. He must likewise furnish a model, if practicable, and make oath that he believes himself to be the first inventor or discoverer of the art, &c., and does not know or believe that it was ever before known or used; and he must further state of what country he is a citizen." (a) It is further provided that a patent may be taken out, although one has been already taken in a foreign country. So, by executors and administrators. Patents are also made assignable. It is further provided, that the patentee shall not lose his right, if he believed himself the first inventor, though in fact the invention were previ-

(a) In reference to the bearing of citizenship upon a patent, it is held, that the patent laws were not intended to apply to and govern the structure or equipment of a vessel of a foreign friendly nation, resorting to our ports, by our consent, for purposes of lawful commerce. Where a French vessel was rigged in France, with gaffs which had been patented in the United States, it was held, that, as the gaffs were placed on the vessel when she was built, as part of her original equipment, in a foreign country, by persons not within the jurisdiction of our patent laws, they were not within their application, but exempted. *Brown v. Duchesne*, 2 Curtis, C. C. 371. See *Gatling v. Newell*, 9 Ind. 572.

See, as to the case of an alien patentee and an American assignee, *Tatham v. Lowber*, 2 Blatch. 49.

Under St. of July 4, 1836, § 15, requiring an alien patentee to offer the article for sale; it is not necessary that he should

have hawked or endeavored to sell it. His rights will be affected, only if he neglected or refused to sell the invention for reasonable prices, when application was made to him to purchase. *Ib.*

In England, the exclusive right under an English patent will be enforced against foreigners whilst in England, in the same way and to the same extent as it would against British subjects. Therefore, in a case in which the foreign owners of a ship caused to be made in their own country, and attached to their vessel, a steam screw propeller, the manufacture and use of which was unrestricted by law there, but restricted in England by a patent, and afterwards sent the vessel with a cargo for the purposes of trade to England; the use of the steam propeller was restricted by injunction, while the vessel should be within the waters covered by the English patent. *Caldwell v. Van Vlisengen*, 9 Eng. L. & Eq. 51.

ously used in a foreign country, unless patented or described in print.¹

§ 3. In general, *novelty* and *utility* are the two essential elements of a valid patent.² (a) An instruction to the jury, that, *if there is anything* new and useful described in a patent, it is valid, is held to be erroneous.³ But *invention*, however inconsiderable, is sufficient.⁴ And it is no objection, that the claim in a patent is for an arrangement of machinery so simple and obvious as not to be the subject of a patent.⁵ The *principle* of a machine means the *modus operandi*, or that which applies, modifies, or combines mechanical powers to produce a certain result; and, so far, a principle, if new in its application to a useful purpose, may be patentable.⁶ But it is often a question of difficulty, whether one machine operates *upon the same principle* as another, and whether that which is termed an improvement is really new and useful. The material inquiry usually is, not whether the same elements of motion, and in some respects the same mode of operation and component parts are used, but whether the given effect is produced substantially by the same mode of operation and combination of powers. Mere colorable differences or slight improvements will not affect the right of the first inventor.⁷ (b) Whether an invention is new, is a question

¹ Tetley v. Easton, 2 C. B. N. S. 706; Boville v. Keyworth, 7 Ell. & B. 725; U. S. St. July 4, 1836, c. 357, § 6; Ryan v. Goodwin, 3 Sumn. 518; Lowell v. Lewis, 1 Mas. 182; Wyeth v. Stone, 1 Story, R. 273.

² 2 Kent, 366-7.

³ Holliday v. Rheem, 18 Penn. 465.

⁴ Teese v. Phelps, 1 McAll. 48.

⁵ McCormick v. Seymour, 2 Blatch. 240.

⁶ Barrett v. Hall, 1 Mas. 470; Whittemore v. Cutter, 1 Galli. 478; Woodcock v. Parker, Ib. 438; Boulton v. Bull, 2 H. Bl. 486.

⁷ 2 Kent, 369-70.

(a) Novelty and utility seem to have been the cardinal requisites of a patent at common law. Noy, Rep. 182; Hawk. P. C. 231.

Whether an improvement is a patentable invention, is a mixed question of law and fact, and should not, in ordinary cases, be disposed of on demurrer, and without a jury. Teese v. Phelps, 1 McAll. 17.

The production of the patent is *prima facie* evidence of novelty. Ibid.

As to patents in connection with railroads, see Winans v. Schenectady, &c. 2 Blatch. 279; Winans v. N. Y. &c. 21 How. 88.

(b) As the immersion of cloth in a steam bath, for the purpose of damping it, instead of immersing it in hot water. Rex v. Fussell, Webst. Pat. 26.

The plaintiff, having obtained a patent for purifying gas, by passing it through precipitated or hydrated oxides of iron, and secondly renovating the purifying material by exposing it to the action of the air, brought

a suit for an infringement. It was shown that a specification of a prior patent obtained by one Croll, after speaking of the use of oxide of manganese as a purifier, went on to say, "the same effect may be produced with the oxide of zinc, and the oxides of iron treated as above described." Held, that, even if Croll intended to claim all iron oxides as purifying agents, inasmuch as some would not answer this purpose, the court could not say, as matter of law, that a patent could not be had for a subsequent discovery, that precipitated hydrated oxides were the proper ones to be used for the purposes desired. And they refused to set aside a verdict, finding that Croll's specification did not disclose the use of hydrated iron oxides. Hills v. London, &c. 5 Hurl. & Nor. 312.

One Laming, having a patent for purifying gas by chloride of calcium, specified a mode of obtaining it by decomposing mari-

for the jury.¹ And presumptive evidence is admissible of a prior use.²

§ 4. It has been held doubtful, whether a mere change in the mode of fastening knives on a cylinder to be ground, or to fasten one instead of several, is a change in structure from an old machine, sufficient to justify a patent for it.³ So the forming of metal screws or shanks, to clay and porcelain knobs for doors and furniture, by pouring metal in a fused state into a dovetail-shaped cavity in the base of the knobs, that mode of fastening the shank to the knob having been previously applied to knobs of wood and metal; is not patentable, although it produce a better or cheaper article than any known before.⁴

§ 5. If the idea of the discovery has not been embodied in a practical form, though it has occurred to others, it will not disprove novelty.⁵ (See § 12.) The first inventor, who has *reduced his invention first to practice*, and put it to some real and beneficial use, however

¹ *Steiner v. Heald*, 6 Eng. L. & Eq. 536.

² *Parker v. Ferguson*, 1 Blatch. 407.

³ *Hovey v. Stevens*, 1 W. & M. 290.

⁴ *Hotchkiss v. Greenwood*, 11 How. U.

S. 248; 4 McLean, 456. See *Bush v. Fox*, 26 Eng. L. & Eq. 464; *Root v. Ball*, 4 McLean, 177.

⁵ *Teese v. Phelps*, 1 McAll. 48.

ate of manganese, iron or zinc, and set forth that "the resulting oxides or carbonates were useful for the purification of gas." Oxides so prepared would be hydrated. Held, the court could not say, as matter of law, that Laming had anticipated the plaintiff's invention. *Ib.*

It was previously known, that hydrated oxides of iron would absorb sulphureted hydrogen, but this principle had not been applied to the purification of gas. Held, such an application of it was the subject of a patent. *Ib.*

It was also known, that sulphuret of iron, produced by the action of sulphureted hydrogen upon hydrated oxide of iron, would be reoxidized by exposure to atmospheric air. But it was not known, that, when such sulphuret was produced by exposure of such oxide to the action of sulphureted hydrogen mixed with coal-gas, the reoxidation of the iron might not be prevented by some of the elements of the compound. Held, a patent might be had for the reoxidizing iron by exposure to the air, after it had been used in purifying coal-gas. *Ib.*

A patent was taken out in 1853 for, amongst other things, improving the texture of the threads of cotton and linen yarns, by exposing the threads in a distended state to the action of beaters, the

effect of which was to polish the sides of the threads and produce smoothness and a glacé effect. In 1856, the plaintiffs took out a patent for, amongst other things, an improvement in the finishing of yarns of wool or hair, by exposing their threads in a distended state to the action of machinery, which, it was admitted, was substantially the same as the machinery described in the patent of 1853. The claim in the plaintiff's specification was, amongst other things, to the invention of "causing yarns of wool or hair whilst distended and kept separate to be subjected to the action of rotatory beaters or burnishers, whereby the fibre is closed and strengthened, and the surface effectually polished." In an action for infringement, it was proved that the process of the patentees of 1853 had not previously been applied to wool or hair; and evidence was given, that the effect upon wool was not the same as upon linen. Held, the specification claimed what was merely the application of the old machinery in the old manner to an analogous subject, and was not the subject-matter for which a patent could be claimed, and, consequently, that the plaintiff's patent was wholly void; though it would be otherwise, if the claim had shown any novelty or invention in the mode of applying the old machinery to the new purpose. *Brook v. Aston*, 8 Ellis & B. 478.

limited, is entitled to a priority of the patent right, and a subsequent inventor cannot sustain his claim, though he is an original inventor, and has obtained the first patent. If the patentee be not the first or original inventor in reference to all the world, he is not entitled to a patent, even though he had no knowledge of the previous use or previous description of the invention, in any printed publication.¹ If the thing claimed has been before made or described in any public work, the discovery is not new, and the patent is consequently void.² But a patent will not be avoided by *experiments* previously made by another, although such experiments led to the invention or discovery.³ Whoever finally perfects a machine, and renders it capable of useful operation, is entitled to a patent, although others may have had the idea, and made experiments towards putting it in practice, and although all of the component parts may have been known under a different combination, or used for a different purpose.⁴ Thus, where an invention consists in the application of spiral springs to the churn dash, in such a manner that it may be operated by the foot; evidence that spiral springs are not a modern invention does not show that the invention is not new.⁵ So A obtained a patent, for an improvement in packing hydraulic and other machines, by means of a lining of soft metal, and thereby of rendering certain parts of such machines air and fluid tight. B afterwards discovered, that soft metal had the property of diminishing friction, and of preventing the evolution of heat when applied to the surfaces in contact of machines, in rapid motion and subject to pressure, and he embodied the application of that discovery to machines in a patent. Held, the application of the soft metal by B differed essentially from that of A, and B's patent was new.⁶ And a patent is not void, merely because *every part* of the machine described is not the original invention of the patentee. It is for the parts claimed as his own invention, and as such particularly pointed out, that the patent is issued. It covers no more. And, if anything be included in a patent, or in the claim, which is not new, the patent is void.⁷

§ 6. A new *composition of known materials* or a new *combination*

¹ 2 Kent, 368.

² Brooks v. Jenkins, 3 McLean, 432.

³ Allen v. Hunter, 6 McLean, 303.

⁴ Washburn v. Gould, 3 Story, 122;

Winans v. Boston, &c. 2 Story, 412; Bean v. Smallwood, Ib. 408.

⁵ Dunbar v. Marden, 13 N. H. 311.

⁶ Newton v. Vaucher, 11 Eng. L. & Eq. 589.

⁷ Holliday v. Rheem, 18 Penn. 465.

of existing machinery, producing a new and useful result, is the proper subject of a patent.¹ (a) Or a combination of old and new materials.² The question is, whether the *whole* (made of old and new) is new, and this is a question for the jury.³ So a new and useful combination is entitled to a patent, though the parts were *in common use* before; ⁴ in which case, the patent will be for the entire machine as combined, and not for its parts, and the parts are not withdrawn from the use of the community.⁵ (b)

¹ *Boville v. Moore*, Dav. Pat. Cas. 361; *Moody v. Fiske*, 2 Mas. 112; *Holliday v. Rheem*, 18 Penn. 415; *Silsby v. Foote*, 20 How. 378; *M'Cormick v. Seymour*, 2 Blatch. 240.

² *Sellers v. Dickinson*, 6 Eng. L. & Eq. 544.

³ *Newton v. Grand, &c.* 6 Eng. L. & Eq. 557.

⁴ 2 Kent, 371.

⁵ *Brooks v. Jenkins*, 3 McLean, 432.

(a) A patent for "a combination of mechanical powers to effect a useful result" — "differs essentially in its principles from one where the subject-matter is new." Per Davis, J., *Eames v. Godfrey*, 1 Wall. 79.

A claim for a combination of several devices, so combined as to produce a particular result, cannot be sustained as a claim for "any mode of combining those devices which would produce that result," but only as a claim for the peculiar combination of devices invented and described. *Case v. Brown*, 2 Wall. 320. See *Burr v. Duryee*, 1 Ib. 533.

(b) A patent for several machines, each being a distinct and independent invention, is valid, where they are capable of being used in connection, and of subserving a common end. But their actual employment together does not seem to be required, to sustain the validity of the patent in which they are united; and the wrongful use of either separate machine is a violation of the patent right *pro tanto*. *Emerson v. Hogg*, 2 Blatch. 1.

If one part of a combination is new, though the other parts are old, the combination is new. The improvement upon the old contrivance must embody some originality, and something substantial in the change, producing a more useful effect and operation. In determining this question, the jury have a right to take into consideration, in connection with the change, the result which has been produced; because the result, if greatly more beneficial than it was with the old contrivance, reflects back and characterizes in some degree the importance of the change. *Hall v. Wiles*, 2 Blatch. 194.

Under a patent, specifying and claiming the combination of certain elements, the patentee cannot for the first time, at the

trial, upon proof that the defendant's machine combines some of those elements only, show that those claimed by him, but which are not contained in the defendant's machine, are immaterial and useless, and thereupon recover. *Vance v. Campbell*, 1 Black, 427.

The provision in the act of 1837, that a suit shall not be defeated because the patentee claims more than he has invented, only applies where the invention can be clearly separated from the part claimed, but not invented, and consequently not where the claim is of a combination. *Ib.*

Where the claim of a patent is for a combination of four elements specifically defined, though the parts separately are all old, yet, if the patentee is the first to combine the four, and thereby produce a new and useful result, he is protected therein by his patent. To defeat the novelty of such a claim, the prior application must have been an apparatus of practical utility, and have embraced all the elements set forth in such a claim. *Foote v. Silsby*, 2 Blatch. 260.

Though a patent for a combination does not import a claim that each of its parts is new, and the patent may be valid though each part is old; the use of a subordinate part only of a combination, if new and material, may be an infringement of the patent for the combination. *Lister v. Leather*, 8 Ell. & B. 1004.

There may be a patent for a combination, though both agencies had been separately used in the same operation referred to by the specification; as in case of combination of a blast and an *exhaust* applied to the working of a mill. *Bovill v. Keyworth*, 7 Ell. & B. 725. See *Harrison v. Taylor*, 3 Hurl. & Nor. 301; 4 Ib. 815.

But not a change of form merely, or of mechanical structure, which produces no new or materially improved result. And this, though patented, is an infringement of a prior patent.¹ (a) So the substitution of one mechanical power for another—as of the wheel and axle for the screw—is not an *invention*.² And, as the *principle* of a machine is the operative cause by which a certain effect is produced; if machines are substantially alike in structure, and produce a similar effect, they are the same in principle. And merely changing the *position* of a machine does not alter its principle. So machines may differ somewhat in principle, and yet be substantially the same.³ While, on the other hand, a difference, in *form* or *proportions* only, makes no difference in the principle of machines. If they operate on the same principle in the application of the power, they are in law identical.⁴

§ 7. A previous public use of the article by the patentee himself will avoid the patent. Thus a party, whilst engaged in carrying into effect a contract for the erection of a pier, invented certain machinery, which he used on the works for several months before applying for a patent, during which time it was open to the inspection of the public. Held, the invention had been dedicated to the public, and he was not entitled to a patent.⁵ So, if the first inventor has suffered his invention to go into public use, or to be publicly sold for use, before taking out a patent, the better opinion and the weight of authority is, that he cannot afterwards resume the invention and hold the patent.⁶ But the use or knowledge of the invention, prior to the application for a patent, will not affect the right of the inventor, if such knowledge was surreptitiously obtained and published, without his acquiescence in the public use of it, and if he immediately asserts his right.⁷ (b)

¹ Sargent v. Larned, 2 Curt. 340.

⁵ Adamson's Patent, 35 Eng. L. & Eq.

² Blanchard's, &c. v. Warner, 1 Blatch. 327.

⁶ 2 Kent, 368.

³ Brooks v. Jenkins, 3 McLean, 432.

⁷ Shaw v. Cooper, 7 Pet. 292.

⁴ Brooks v. Bicknell, 3 McLean, 250.

(a) The application of a well-known tool to work previously untried materials, or to produce new forms, is not the subject-matter of a patent. Patent, &c. v. Seymour, 5 C. B. (N. S.) 164.

(b) The law allows a reasonable time to an inventor to perfect his invention by experiments, and ascertain its utility, before it obliges him to take out a patent; but he must act in good faith, and not permit his invention to be used except for the pur-

poses of experiment. In applying the rule, it will be for the jury to consider the nature of the invention, and all the circumstances. In the case of an improved railroad car, the experiments could be made only by putting the car into the service of the lines of railroads. Winans v. Schenectady, &c. 2 Blatch. 279.

An inventor, for the purpose of completing his specification, having used oxides of iron for the purification of gas, and having

§ 8. In general, the prior use of an invention, which invalidates a patent, is a use by persons in carrying on their trade, and without concealment. But it is doubted, whether a patent for improvements in a manufacture would be valid, if one person had previously perfected the article and sold it to the public, though he kept the process secret. The previous open use of the article, *per se*, avoids the patent. Hence where, in case for the infringement of a patent for improvements in the manufacture of iron and steel, by "the use of carburet of manganese in any process whereby iron is converted into cast steel," the plea denied the novelty of the invention; and it appeared from the evidence of witnesses for the defendant, that, for eight or ten years before the grant of the patent, three firms had manufactured steel in the manner described in the patent, and had used and sold the steel so manufactured in the way of their trade, and without concealment; and the judge directed the jury, that, if they believed the witnesses for the defendant, the patent was void: held, there was no other question for the jury, and that there was such a public use of the invention as invalidated the patent.¹

§ 9. A patent issued in the United States, on the application of one believing himself to be the first inventor, is not invalidated by an invention made in a foreign country a few weeks or months preceding, but not patented or described in any printed publication, in such a manner as to embrace any substantial part of his invention, until after his application for a patent.²

§ 10. Where, on an application for a patent, the papers are returned from the patent-office for informality; yet, if the application is followed up with reasonable diligence, and the patent granted, the right of the patentee will not be defeated, although

¹ Heath v. Smith, 25 Eng. L. & Eq. 165.

² O'Reilly v. Morse, 15 How. U. S. 62.

allowed the gas so purified, to the extent of 20,000 feet per day, for many days during a period of several months, to be supplied to the public through the mains of a gas company, mixed with their other gas; the court refused to set aside a verdict, that what was done was in the nature of an experiment, and not a publication of the invention. Hills v. London, &c. 5 H. & N. 312.

An inventor may abandon his invention, or dedicate it to the public, at any time before procuring his patent; but declarations of an intention to abandon must be accompanied by acts, neither acts nor declarations

alone being sufficient; and such abandonment, being in the nature of a forfeiture, must be made out beyond all reasonable doubt. Pitts v. Hall, 2 Blatch. 229; McCormick v. Seymour, Ib. 240.

Unless the inventor intends to patent his invention, he cannot do it after its use by a third person. If A, under the belief authorized by the inventor that he permits it, copies the machine; he is not liable after a patent issues. Otherwise, where A surreptitiously gains knowledge of the invention. And all these are questions for the jury. Kendall v. Winsor, 21 How. 322.

he sold the patented article, after his application, and before the granting of his patent, and the officers of the patent-office failed to give information of his application to a person who made inquiries there with regard to it.¹

§ 11. With reference to the *utility* requisite to the validity of a patent; an invention is *useful*, though not the very best for the intended use, if *at all valuable* and susceptible of being employed for that purpose.² The question is, not whether the machine is the best one known to the community, nor whether it does its work better or faster than any other, in the same department of labor, but whether it is to a certain degree useful.³ (a) The right of an inventor depends upon the question, whether the machinery, as described, will or will not *practically and usefully accomplish the end*, not upon its being *more or less perfect*.⁴ It need not supersede or be more useful than all other inventions for the same purpose. It is sufficient that it may be applied to practical purposes, *with some degree* of beneficial use; that it is not injurious, frivolous, or insignificant, and has no pernicious, immoral, or mischievous tendency; and, so far as it is applied, is salutary.⁵ And, upon the question of *utility*, courts are not rigid. Unless the invention be shown to be absolutely frivolous and worthless, the patent is valid.⁶ Thus approving of and using a patented improvement is an acknowledgment of its utility, and the user must pay for it.⁷ So the patent itself raises the presumption of novelty and utility; and upon this inquiry the burden of proof is upon the defendant.⁸

§ 12. As already stated (p. 19), to constitute a prior invention, the party must have *reduced his idea to practice*, and embodied it in some distinct form. It is not enough, that another conceived

¹ Sparkman v. Higgins, 1 Blatch. 205.

² Many v. Jagger, 1 Blatch. 372.

³ Wilbur v. Beecher, 2 Blatch. 132.

⁴ Parkhurst v. Kinsman, 1 Blatch. 488.

⁵ Dunbar v. Marden, 13 N. H. 311;

Lowell v. Lewis, 1 Mas. 182; Bedford v.

Hunt, Ib. 302; Kneass v. Schuylkill, &c.

⁴ Wash. 9.

⁶ Parker v. Stiles, 5 McLean, 44.

⁷ Simpson v. Mad River, &c. 6 McLean, 603.

⁸ 5 McLean, 44.

(a) A patent was obtained for an improvement in a mill for breaking and grinding bark; which would in a given time grind double the quantity of the old mill. Held, evidence enough of utility. 2 Blatch. 132.

Novelty and *utility* are, in certain aspects, rather one and the same than distinct elements of a valid patent. Thus, in a leading case, Chief Justice Marshall attached

great importance to the word *simply*, in the statutory clause. "Simply changing the form or proportion of any machine shall not be deemed a discovery;" holding, that, if a new effect is produced by such change, it is not *simply* a change of form and proportion, but also of *principle*. Davis v. Palmer, 2 Brock. 298, 310 See Pettibone v. Derringer, 4 Wash. 218

the possibility of effecting what the patentee accomplished.¹ A mere *principle* is not patentable.² Thus neither electricity nor steam can be exclusively appropriated, except by mechanical inventions or combinations, which produce a certain effect.³ And, on the other hand, it is not necessary for the protection of a patent, that the patentee should be the first person who conceived the practicability or existence of the thing patented, but who, though making important experiments, was unable to bring them to any successful or valuable result. He who reduces speculation to practice, whose experiments result in discovery, and who then afterwards first puts the public into practical and useful possession of the compound, art, machine, or product, is entitled to the patent right.⁴ Hence a patent for "the use of the motive-power of the electric or galvanic current (called electro-magnetism), however developed, for making or printing intelligible characters, signs, or letters at any distances, being a new application of that power," and not limited to the specific machinery described in the specification, is held too broad, and therefore void.⁵ And it is no objection to the granting of a patent, that the discovery or invention occurred *by accident*,⁶ or by "some sudden and lucky thought."⁷ Nor is the right of an inventor to a patent impaired, by making inquiries of, or receiving information or advice from, men of science, in the course of his researches.⁸ It is not sufficient to show that the suggestions made aided the invention, but it must appear that they would furnish all the information necessary to construct the improvement.⁹

§ 13. The question sometimes arises, whether a patent is granted for a *machine* or a *process*. Thus a patent for "a new and useful machine for rolling puddle-balls, or other masses of iron, in the manufacture of iron," the specification annexed to which describes the improvement as consisting in "the employment of a new and useful machine for rolling of puddlers' balls," although the claim is "for the preparing of the puddlers' balls as they are delivered from the puddling furnace, by causing them to pass between a revolving cylinder and a curved segmental trough adapted thereto, constructed and operating in the manner of that herein described,"

¹ Parkhurst v. Kinsman, 1 Blatch. 488.
See Morewood v. Tupper, 30 Eng. L. & Eq. 555.

² Smith v. Ely, 5 McLean, 76.

³ Ibid.

⁴ Goodyear v. Day, 2 Wallace, Jr. 283.

⁵ O'Reilly v. Morse, 15 How. U. S. 62.

⁶ Earle v. Sawyer, 4 Mas. 1.

⁷ Per Tindal, C. J., Crane v. Price, Webster, Pat. Cas. 411.

⁸ O'Reilly v. Morse, 15 How. U. S. 62.

⁹ Pitts v. Hall; 2 Blatch. 229.

&c., is a patent for a machine, and not for a process.¹ A patent for a *machine* must be for the machine, not its "mode of operation," "principle," "idea," or any abstraction.² Where an improvement of a *process* is patented, the process must be an original one.³ But whether the invention is a process or machine, is not a question upon which the law allows the opinion of an expert.⁴

§ 14. The claim of a patent for *improvements*, (a) in the mode of doing anything by a known process, is sufficient to entitle the claimant to a patent for his improvements, when applied either to the process as known at the time of the claim or to the same process altered and improved by discoveries subsequently published, so long as it remains the same with regard to the improvements claimed and their application.⁵ And mere change in the

¹ Corning v. Burden, 15 How. U. S. 252.

² Burr v. Duryee, 1 Wall. 579.

³ Burr v. Duryee, 1 Wall. 581.

⁴ Corning v. Burden, 15 How. U. S. 252.

⁵ Electric, &c. v. Brett, 4 Eng. L. & Eq. 347; M'Cormick v. Talcott, 20 How. 402. See M'Chire v. Jeffrey, 8 Ind. 79.

(a) The claim, upon which a patent for an "improvement in the construction of cars or carriages intended to run on railroads," was granted, was for "the before described manner of arranging and connecting the eight wheels which constitute the two bearing carriages, with a railroad car, so as to accomplish the ends proposed by the means set forth, or by any others which are analogous and dependent on the same principles." Held, a claim for the car itself, constructed and arranged as described in the patent; and proof that parts of the arrangement and construction were before known does not affect the validity of the patent. *Winans v. Schenectady, &c.* 2 Blatch. 279.

The discovery of a new application of some property in nature, never before known or in use, producing a new and useful result, is the subject of a patent, independently of any peculiar or new arrangement of machinery, for the purpose of applying the new property in nature; and the inventor has a right to use any means, old or new, in the application of the new property, to produce the new and useful result, to the exclusion of all other means.

Thus, in a patent for an "improvement in regulating the draft of stoves," a claim to "the application of the expansive and contracting power of a metallic rod by different degrees of heat, to open and close a damper which governs the admission of air into a stove in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the

flue," is a claim independent of any particular arrangement or combination of machinery, or contrivance for the purpose of applying the principle to the regulation of the heat of stoves, and has nothing to do with the peculiar arrangement or construction of the machinery used.

The novelty of the invention covered by this claim can be defeated, only by showing the prior application of the principle of the expansion and contraction of the metallic rod to regulate the heat of a stove, by means of the heat produced by the stove itself. It would not be defeated by showing a prior application of such principle, where the metallic rod was heated indirectly by the heat of a furnace, by being immersed in hot water.

Such prior application, to defeat the novelty of the claim, need not have been made by the best apparatus that could be devised. The question will depend upon the practically useful and successful prior application of the principle.

Thus where, in the above claim, the damper was opened and shut by the expansion and contraction of a brass rod in connection with an iron stove, caused by the heat of the stove itself; it was held, that the former use of a compound rod, made of a slip of brass and of a slip of iron, fastened together, by the expansion and contraction of which, caused by the heat of the stove, the damper was moved, defeated the novelty of the claim. *Foot v. Silsby*, 2 Blatch. 260.

form of the machinery (unless a particular form is specified as the means by which the effect described is produced) or in some unessential parts, or the use of known equivalent powers, not essentially varying the machine, or its mode of operation or organization, will not make the new machine a new invention; nor, although it be an improvement on the former, justify its use without the consent of the first patentee; although a patentee may obtain a new patent, for such an improvement on his own invention, already patented, as might be patented if invented by another person.¹

§ 15. The same patent cannot include two distinct machines; but a claim for a combination of mechanical powers, and the invention or improvement of one or more of the parts of which the combination consists, may be included in one patent.² And a patent, covering (1) an improvement in a steam-engine, converting the reciprocating motion of the piston into a continued rotary motion, by means of a revolving shaft parallel with the piston-rod, to which motion is communicated by a friction-roller on the piston-rod moving in a spiral groove in a cylinder on the shaft; (2) the application of the motion of this shaft to make the capstan of a steamboat revolve; and (3) an improvement in the form of a spiral paddle-wheel of a steamboat; is held not to be bad, as covering distinct and independent inventions.³ But where a patentee claims three distinct improvements, he must show himself entitled to each to sustain an action.⁴

§ 16. A distinction is made between a patent for a *mode of manufacturing* a particular article, and *for the article itself*. Thus a patent was taken out, the title of which was (after a disclaimer of part) for "improvements in the manufacture of candles." The specification stated the invention to relate to "a mode of manufacturing candles by the application of two or more plaited wicks in each candle," and set out at length the mode of so placing the wicks, that, in burning, the ends always turned outwards. In an action for infringement, a candle was produced which had been made at the defendant's manufactory, in which the wicks turned outwards in burning, but no evidence was offered of the mode in which it was made. Held, that there was no evidence of infringe-

¹ O'Reilly v. Morse, 15 How. U. S. 62.

³ Hogg v. Emerson, 11 How. U. S. 587.

² Root v. Ball, 4 McLean, 177; Parker v. Haworth, Ib. 370.

⁴ Heinrich v. Luther, 6 McLean, 345.

ment, the patent being for the mode of manufacturing such a candle, and not for the candle itself.¹

§ 17. A patentee cannot maintain his patent if he is not *the sole* inventor; and, if the principal feature of the invention is suggested to him by another, he is not entitled to a sole patent.² (a) But, on the other hand, a joint patent is void, if it appear that all the patentees did not participate in the invention; though the patent is *prima facie* evidence of such participation.³

§ 18. In regard to what constitutes violation or *infringement* of a patent, the exclusive right in a patent is the construction and use of the thing patented. Thus where the right consists in certain instruments, by which a bedstead of a particular structure is made; the making and using of these instruments is prohibited; but the sale of the bedsteads when manufactured is not.⁴ But imitation of *any part* of the article patented, if new and useful, and used to effect the same object, is an infringement.⁵ Thus the title of a patent, and every part of the specification, in which directions were given for putting the apparatus in use, mentioned "metallic circuits" as the means by which the electric current was conveyed, but no claim was made in respect of such circuits. At the time of the patent it was not known, but it was subsequently discovered, that the earth might be used to complete the circuit to an extent of almost one half of the circuit, and that metal might be dispensed with to that extent, and the defendants had always used this new discovery. Held, nevertheless, that, the defendants having been found by the jury to have adopted *a part* of the plaintiff's invention, the patent had been infringed.⁶ So

¹ Palmer v. Wagstaffe, 25 Eng. L. & Eq. 535.

² Thomas v. Weeks, 2 Paine, 92.

³ Hotchkiss v. Greenwood, 4 McLean, 556.

⁴ Boyd v. Brown, 3 McLean, 295.

⁵ Smith v. London, &c. 20 Eng. L. & Eq. 94; Patent, &c. Co. v. Seymer, 5 C. B. (N.S.)

164. See Morewood v. Tupper, 30 Eng. L. & Eq. 555; Byam v. Bullard, 1 Curt. 100; Byam v. Parr, Ib. 260; Foster v. Moore, Ib. 279; Brooks v. Fiske, 15 How. 212. Newall, 4 C. B. (N. S.) 269.

⁶ Electric, &c. v. Brett, 4 Eng. L. & Eq. 347.

(a) L and W were joint patentees of an invention for propelling vessels, and, whilst engaged in making experiments with regard to it, an accident happened, which appeared to have suggested to each an improvement upon the method previously adopted. They communicated their ideas to each other, but neither took any steps to secure the benefit of the invention for two years, when L applied for a patent, against the sealing

of which W entered a *caveat*, on the ground that he (W) was the first inventor. The evidence on this point being conflicting, it was held, that L, having first applied, was entitled to have his patent sealed, though possibly W might be able to get it repealed upon *scire facias*. Lowe's Patent, 35 Eng. L. & Eq. 325. See Allen v. Blunt, 2 W. & M. 121

there may be an infringement, though there is a difference of shape, and in consequence the machine works better and faster.¹ Or in the use of an invention in making a machine.² Where the article constructed and produced in evidence is substantially the same with the one patented, the variations being in form and not in substance; or where a new and substantial result is not produced by the variation: the right of the patentees to damages will not be affected.³ To avoid an infringement, the new effect, which is to give materiality and importance to the apparently formal change, must be something more than the merely doing more work in a given time, or in the reduced amount of power required to operate the machine. The new effect must be different in kind.⁴ So, if any part of the invention be used, the *simplicity* of such invention does not affect the question of infringement. Thus the jury found, that "the sending of signals to intermediate stations" was a new invention of the patentees, and had been adopted by the defendants. There was a distinct claim in the specification for this improvement, and the method of carrying it into effect was pointed out. Held, that this was the proper subject of a patent; that the obviousness and simplicity of the idea and method did not make any difference; and that the plaintiffs were entitled to a verdict in respect of such finding, although by the defendant's method signals were sent from, as well as to, intermediate stations.⁵ (a) So the use of *the elements* of a composite substance is

¹ Wilbur v. Beecher, 2 Blatch. 132.

² Blanchard v. Beers, 2 Blatch. 411.

³ Teese v. Phelps, 1 McAll. 48.

⁴ Tatham v. Le Roy, 2 Blatch. 474.

⁵ Ibid.

(a) The plaintiff's system was worked by six wires, but no specific claim was made to any particular number of wires, or any particular system of making the signals. The defendants used only one wire, and made the signals in a different manner, by counting repeated deflections of the needle. Held, that a finding of the jury, "that as a whole the system of counting with one wire and two needles is not the same as the system of the plaintiffs," did not entitle the defendants to a verdict, the plaintiffs' claim not being to any particular system, but to the particular improvements pointed out in the specification. *Electric, &c. v. Brett*, 4 Eng. L. & Eq. 347.

The specification of a patent, for "improvements in the manufacture of envelopes" described a machine, in which a piece of paper was held upon a platform,

whilst the flaps of the envelope were folded; and concluded by claiming "the so arranging machinery that the flaps of envelopes may be folded thereby as herein described." Held, a machine in which the flaps of an envelope were folded might be an infringement, although the envelope was not held down during the operation of folding. *De La Rue v. Dickenson*, 7 Ell. & B. 738.

The specification of a patent for an invention with a similar title described and claimed "the application of gum or cement to the flaps of envelopes by apparatus acting in the manner of surface printing." Held, an apparatus for applying the gum might be an infringement, although it acted only in part in the manner of surface printing according to the description contained in the specification. *ib.*

a use of the composite, and an infringement of a patent for the use of the composite substance.¹ And where the elements of a composite substance are used, and in the process of the manufacture the composite is itself formed, this is not the use of an *equivalent* for that substance, but the use of the substance itself.² And a patent for the use of a substance in a process is held to be infringed, by the use even of a chemical equivalent, known to be so at the time of the use, if used for the purpose of taking the benefit of the patent, and of making a colorable variation therefrom.³ But a patent for a combination of known mechanical powers is not infringed, unless the same parts are used in the same combination.⁴ Nor by using a part of the combination.⁵ (a) A patent for a combination of distinct and designated parts is not infringed by a combination which omits one of those parts, substituting another substantially different in construction and operation, though serving the same purpose.⁶ Although a patented combination cannot be lawfully used, notwithstanding some addition to it.⁷ The distinction is made, that there is no infringement where there is a *new idea*. Otherwise, where the general plan and purpose are the same, though not the mode of construction.⁸ And in general the plaintiff must show, that the defendant has used his invention, either in the precise form in which it is constructed under the patent, or in a form, and on principles, substantially the same. If the operative principle of two machines be the same, the substantial identity contemplated by the patent law is established.⁹ (b)

¹ Heath v. Unwin, 14 Eng. L. & Eq. 202.

² Ibid.

³ Per Erle, J., Ibid.

⁴ Brooks v. Bicknell, 4 McLean, 70. See Higgs v. Goodwin, 1 Ell. B. & E. 529.

⁵ M'Cormick v. Maury, 6 McLean, 539; Stimpson v. Baltimore, &c. 10 How. 329.

⁶ Eames v. Godfrey, 1 Wall. 78.

⁷ Pitts v. Wemple, 6 McLean, 558.

⁸ M'Cormick v. Seymour, 2 Blatch. 240.

⁹ Parker v. Stiles, 5 McLean, 44.

(a) In the case of a *plough* it was remarked, "none of the parts referred to are new, and none are claimed as new; nor is any portion of the combination less than the whole claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. The use of any two of these parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement and connection with the others, is, therefore, not the thing patented. It is not the same combination, if it substantially

differs from it in any of its parts." Per Taney C. J. *Prouty v. Ruggles*, 16 Pet. 341.

(b) Where, in a suit for infringing a patent for a saw-set, the declaration set forth in the specification a hammer of wrought iron with a steel point, as part of the set, and the hammer of the defendant's set was all of steel; it was held to be no infringement, or a very doubtful one. *Aiken v. Bemis*, 3 W. & M. 348.

So a patent for the employment on railroads of narrow grooves, either cast in iron plates, or formed by the juxtaposition of two flat iron rails, on each side of the track,

§ 19. With reference to the form of action for infringement; where the infringement was alleged to have been made upon the right granted to the plaintiff as the inventor of a machine, and also of the right granted to him as the inventor of *an improvement* thereon; it was held, that they constituted one and the same cause of action, and should be joined.¹ (a)

¹ Case v. Redfield, 4 McLean, 526.

for the flanges of the car-wheels to run in, by which the track is adapted to the unobstructed passage over it of common carriages, and to the running of the wheels of the cars on slight curves without dragging; is not infringed by the use of a double flat iron rail, with a groove in it large enough to admit the flange of the wheel, on the inner side of a curve or corner intended to be passed, and of a common flat rail on the outer line of the same curve, both elevated above the ground as high as the general track of the road. *Stimpson v. Baltimore, &c* 10 How. U. S. 329.

Where a person held a patent for an improvement in making friction matches, the invention being only a new combination of old materials before in use, consisting in a composition formed of phosphorus, with the earthy material and the glutinous substance only, without the presence of chlorate of potash, or of any other like objectionable ingredient; it was held, that any person may use any one or all the materials forming the composition, in making matches, provided he does not use them in the combination patented, or that any one may lawfully use them for such purpose, in combination with chlorate of potash, as they were formerly used; though a mere colorable difference or slight variation of the combination would not exempt a person from the charge of infringement. *Byam v. Eddy*, 24 Verm. 666, 2 Blatch. 521.

Where the plaintiffs patented the combination (which was not new) of a hollow ram, sliding upon a cone in a cylinder, for making lead pipe by pressure; held, in an action for infringement, the question was, not whether the defendants used the combination in their machine, but whether they applied it substantially in the same way as was done by the plaintiffs. *Tatham v. Leroy*, 2 Blatch. 474.

But the use of a subordinate part of a combination, if new and material, where one machine produced the pressure by a centrifugal force, urged by a weight attached to a lever, projecting horizontally from the top of a vertical leg, but in the other the weight was partly distributed along a verti-

cal flyer; was held no infringement, though the two machines produced the same result by an application of the same principle. *Seed v. Higgins*, 8 Ell. & B. 755.

The question of infringement is for the jury, although it be admitted that the defendant has used the particular machine or process which is alleged to be an infringement. *Teese v. Phelps*, 1 M'All. 48.

The question was held to be for the jury, where the patent was for a combination for an improvement in *boot-trees*, including a mechanism for distending the leg of the boot-tree, and the plaintiff did not claim that the defendant had used his mechanism for such distention, but that he had used all other parts of his combination, and that the defendant's mechanism performed the same function with the plaintiff's. 1 Wall. 78.

The assignee of a separate and distinct portion of a patent may sue for an infringement of that part, without joining one who has an interest in another part; the damages accruing to the former alone. *Dunncliff v. Mallet*, 7 C. B. (N. S.) 209.

(a) In England, where specific statutory provisions are made for the regulation of trials in patent causes, the following points have been decided:—

In an action for infringement of a patent, it is sufficient for the plaintiff to furnish such particulars of the infringement as show distinctly what are the acts of infringement he complains of—that is, the article, the making or selling of which he alleges is an infringement upon his patent, and the places at which, and the period during which, he proposes to prove such making or selling; and it is not necessary to specify in what respects, or as to what parts or processes of the invention, it is an infringement. *Talbot v. Laroche*, 26 Eng. L. & Eq. 286.

If the processes are so entirely separate and distinct, that different kinds of articles or results are produced, as if one produce pictures in oil and another in water colors, it seems that the particulars should specify the one, an infringement upon which is complained of; but if they are merely different modes of producing the same kind

§ 20. The defendant, in a suit for infringement of a patent, may offer in evidence a later patent.¹

§ 21. Where the plaintiff makes out a *prima facie* case for the violation of his patent, and then the defendant goes forward to prove his special defence, under a notice that the invention had been known and used at divers places by divers persons; it is right to instruct the jury, that, on this defence, it is the duty of the defendant to turn the scales of evidence in his favor.²

§ 22. Where a machine was purchased of the supposed inventor, which had been held to be an infringement of another patented invention in one circuit, the purchaser was not allowed to use the same machine in another circuit, so long as the injunction and the decision remained in force.³

§ 23. In reference to the *specification* preliminary to the obtaining of a patent;—the specification of a patent, as well as the patent itself, is to be construed liberally or benignly in favor of the patentee;⁴ with a fair purpose of carrying out the provisions of the constitution, and the laws based thereon;⁵ not by the grammatical arrangement of the words, but according to their true import;⁶ and with reference to practical views rather than subtle distinctions.⁷ (a) And in considering the validity of a patent,

¹ Corning v. Burden, 15 How. 252.

² Allen v. Blunt, 2 W. & M. 121.

³ Woodworth v. Edwards, 3 W. & M. 120.

⁴ Winans v. Denmead, 15 How. U. S.

330; Goodyear v. The Railroad, 2 Wallace, Jr. 356.

⁵ Parker v. Stiles, 5 McLean, 44.

⁶ Allen v. Hunter, 6 McLean, 303.

⁷ Davoll v. Brown, 1 W. & M. 53; Woodworth v. Hall, Ib. 248.

of article or result, it is not necessary so to distinguish; and it is not necessary to specify particular persons to whom, or the times at which, the article alleged to be a piracy has been sold; it is enough to state some period within which the sales took place. *Ibid.*

A declaration in case, for the infringement of a patent, "for improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through metallic circuits," alleged that the defendants had used "the said invention." The specification of the patent made nine several claims in respect of different improvements. The jury having found an infringement in respect of one of such improvements, that was held to be a sufficient finding of the infringement alleged in the declaration. *Electric, &c. v. Brett*, 4 Eng. L. & Eq. 347.

The defendant's particulars of objection

in support of his pleas, in an action for the infringement of a patent for the manufacture of candles, after alleging that the invention was not new, stated that it had been used by the plaintiff and certain other persons who were named, "and by candle-makers generally in London and the vicinity thereof." Held, that this was a sufficient compliance with the statute 15 & 16 Vict. c. 83, § 41, which requires such particulars to state the place or places at or in which the invention is alleged to have been used. *Palmer v. Wagstaffe*, 20 Eng. L. & Eq. 527.

(a) Patents are not *monopolies* and therefore odious, but are to receive a liberal construction, "ut res magis valeat quam pereat." Thus a "claim" immediately following the description may be explained and restricted by the specification. *Turrill v. Railroad Co.* 1 Wall. 491.

objected to for want of a proper "description of the invention or discovery," filed previously to its issue, this description, even if quite wide of the truth when taken literally, may be aided and made good by the description of "the manner and process of making, constructing, using, and compounding the same." Thus, where the "description of the invention or discovery," described a process, and did not describe a product, but the description of "the manner and process" showed that the purpose and merit of the process was the production of a valuable "fabric;" it was held, in a suit for infringing the patent, by improperly using the product, to be no objection, that the "description of the discovery or invention" described not it, but a process; the "description of the manner and process" showing, that the purpose and merit of the process was the production of a fabric."¹ (a) So the entire specification and drawings are to be examined, and, though there is an error in showing how a particular element enters into the combination claimed, if the residue of the specification and the drawing afford means to correct this mistake, it does not avoid the patent.² And although, generally, the *summary* is to govern; yet, where it refers to the specifications and drawings, they may be taken to aid in construing it.³ Though not to correct a material defect in the specification.⁴ So even drawings which are not referred to.⁵ But, although the machine need not be described by the specification in technical terms; it must be described in clear and precise language. Thus the plaintiff patented "a new and useful improvement in the machinery for grinding knives." On a motion to set aside a nonsuit, it was held, that not only the machine should be described in the specification, but also the new combination, or part claimed as the improvement.⁶ So, to a declaration for infringement of a patent, for "certain improvements in valves or plugs for the passage of water or other fluids," the pleas were, not guilty; that the plaintiffs were not the first inventors; and that the invention was not new. At the trial, the

¹ *Goodyear v. The Railroad*, 2 Wallace, Jr. 356; acc. *Brooks v. Bicknell*, 3 McLean, 250. See *Hills v. London, &c.* 5 Hurl. & N. 312; *M'Cormick v. Seymour*, 2 Blatch. 240; *Newall*, 4 C. B. N. S. 269.

² *Kittle v. Merriam*, 2 Curt. 475.

³ *Hovey v. Stevens*, 3 W. & M. 17; *Hogg v. Emerson*, 11 How. 587.

⁴ *Winans v. Schenectady, &c.* 2 Blatch. 279.

⁵ *Washburn v. Gould*, 3 Story, 122.

⁶ *Hovey v. Stevens*, 3 W. & M. 17.

(a) The provisional specification, under 15 & 16 Vict. c. 83, § 6, need not describe all the minute details as to the manner of

carrying out the invention. *Newall*, 4 C. B. N. S. 269.

plaintiffs put in the specification, which, after describing the invention, claimed as "the improvements" three things, each of which, taken by itself, was old. Held, the patentee might give evidence, that the real invention he claimed was a combination of these three things, and that the specification was not conclusive evidence on this point; but, it seems, the specification was bad.¹ So the specification must distinguish the article from all others previously known, and enable one skilled in the art or science of which it is a branch, or with which it is nearly connected, to construct the article.² And a specification, as matter of law, is void for ambiguity.³ (a) So a patent for an improvement must specify the new parts of the machine; as in case of a machine alleged to have been before applied only for sawing light materials, but now to be designed for the sawing of logs.⁴ It is to be observed, however, that an improvement of a machine, for which a patent may be obtained, may consist of the introduction of a new element into an old machine, which produces a new and useful result, or greater facility in the application of power; and though it appears, from the description or specification of the claimant for an improvement, that part of the elements, included in the description or specification, were not new, but claimed to be newly combined with new elements, the patent is not therefore void.⁵ And, in general, if the patentee claims more than he has invented, his patent is not void; but, so far as his invention goes, he is protected.⁶ So, in an action for infringement of a patent, the Court disallowed the following plea: that the plaintiff, having petitioned for letters-patent, represented to the solicitor-general, to whom the matter was referred, that the invention consisted of matters mentioned in a paper-writing exhibited to the solicitor-general (setting it forth), who, confiding therein, reported that the letters-patent might be granted; that, after the grant of the letters-patent, the plaintiff enrolled his specification in certain terms, and falsely described his invention therein; and that so much of the invention, as was stated in the specification, was not part of the

¹ *Bateman v. Gray*, 20 Eng. L. & Eq. 520.

² *Teese v. Phelps*, 1 M'All. 48. See *Emerson v. Hogg*, 2 Blatch. 1; *Wilbur v. Beecher*, *Id.* 132.

³ *Emerson v. Hogg*, 2 Blatch. 1.

⁴ *Phillips v. Page*, 24 How. 164.

⁵ *Rheem v. Holliday*, 16 Penn. 347.

⁶ *Peterson v. Wooden*, 3 McLean, 248.

(a) The construction of the written words is a question for the court; the application of the facts to the specification for the jury. *Teese v. Phelps*, 1 M'All. 17.

invention in the paper-writing and letters-patent mentioned, and was not part of the invention for which the letters-patent were granted.¹ (a)

§ 24. It has been seen, that, notwithstanding the general rule, that the privilege of a patentee is to be liberally construed, if the specifications do not describe the invention with reasonable certainty and precision, he can claim nothing under his patent.² And the same rule applies, if a patentee claims anything as a material part of his improvement or combination, as new and original with him, which is shown to have been discovered prior to the emanation of his patent.³ It is for the jury to determine, whether the description of a machine in the specification is clear enough to enable a mechanic of ordinary skill to construct the machine without experiments.⁴ (b) It is not enough to describe the whole machine with certainty; but the parts claimed as improvements must be certainly described.⁵ And where too much is claimed, the patent is void, unless the patentee disclaims as to the excess; and his disclaimer should be filed in the patent-

¹ *Hancock v. Noyes*, 24 Eng. L. & Eq. 510.

² *Parker v. Stiles*, 5 McLean, 44; *Davoll v. Brown*, 1 W. & M. 53.

³ *Parker v. Stiles*, 5 McLean, 44.

⁴ *Hogg v. Emerson*, 11 How. U. S. 587; *Wood v. Underhill*, 5 How. 1; *Brooks v. Bicknell*, 3 McLean, 250.

⁵ *Hovey v. Stevens*, 3 W. & M. 17.

(a) A description, by an applicant for a patent, of a machine, in which he sets forth his invention to be for a combination of machinery, not giving notice that he claims any part as new, is a dedication of that part to the public. After such part has passed into public use, the dedication cannot be revoked by surrender and re-issue of the patent, nor otherwise; neither the 13th section of the act of 1836, nor the 7th section of the act of 1837, relating to amending of patents, authorizing a new patent for an invention different from that originally patented. *Batten v. Taggart*, 2 Wallace, Jr. 101.

A patentee, who uses certain words in his specification, and then takes out an amended one, omitting them, is not estopped by those words, after being thus withdrawn. *Allen v. Blunt*, 2 W. & M. 121.

A late case contains a condemnation of the practice of surrendering valid patents, and granting re-issues, merely for the purpose of inserting therein expanded or equivocal claims as an abuse of the act. *Barr v. Duryee*, 1 Wall. 531.

If an application is withdrawn, with the intention of filing a new petition, which is filed, the two petitions are parts of one transaction, and make a continuous application under the acts of 1836 and 1839. *Godfrey v. Eames*, 1 Wall. 317.

(b) In an action for an infringement, the defendant, to prove that the plaintiff's patent was not new, produced an earlier specification of a patent taken out by A, and contended that, upon a comparison of the two specifications, it appeared that the plaintiff claimed as new a method described in A's specification. No user of A's patent was shown. The judge asked the jury, whether a person of ordinary skill could, from A's specification alone, make the thing produced by the plaintiff's patent; and, they having answered in the negative, he directed a verdict for the plaintiff. Held, a misdirection; inasmuch as A's specification might insufficiently describe the process, even so as to make the specification bad, and yet might disclose enough to show that what was claimed in the plaintiff's specification was not wholly new. *Betts v. Menzie*, 8 Ell. & B. 923.

office.¹ A disclaimer merely excludes from the specification the disclaimed portions of the machinery. It cannot be used in explanation of the remainder.²(a) So where a patentee does not certainly describe his invention, so that it can be clearly distinguished; if he have an invention, his remedy is by an amendment to his specification, or a new patent.³ Thus (in illustration of the rules upon this subject above stated), where a combination of two motions was claimed in the summary as new, and gave a traversing motion to a spiral knife, in combination with a reciprocating rotary motion, and these motions, so combined with the means of producing them, seemed from the specification to be the subject of the patent; they were held patentable. But as it was admitted, in an amendment to the specification, that the combination was not a novelty, and no other combination or part was described in the specification or summary as the improvement, the patentee was not allowed to support his patent on any other combination or part.⁴ So the specification of a patent, for improved arrangements for raising ships' anchors, claimed as the invention a cable-holder, thus described: "The scalloped shell in which the iron chain-cable appears in the drawing is upon a new plan, to hold, without slipping, a chain-cable of any size, as shown by the opening form of the scallops at the top and bottom of figure 2." It also claimed, as the invention of the patentee, "the new form of a scalloped shell (as shown in figure 2), in conjunction with the arrangements hereinbefore described." A drawing attached to the specification

¹ Ibid. See *Hall v. Wiles*, 2 Blatch. 194; *Seed v. Higgins*, 8 Ell. & B. 755.

² *Hovey v. Stevens*, 3 W. & M. 17.

⁴ Ibid.

³ *Tetley v. Easton*, 2 C. B. N. S. 706.

(a) The claim in a specification includes all that is described as the means of carrying the invention into effect. *Tetley v. Easton*, 2 C. B. N. S. 706.

"Hydrated or precipitated oxides" was held to mean such hydrated oxides as were precipitated, and to be sufficiently definite. So "an improved mode of manufacturing gas" includes a process of purifying gas, and a disclaimer of that part of the title relating to "obtaining certain substances applicable to the purification of gas," does not preclude a claim for renovation of the purifying material. *Hills v. London, &c.* 5 Hurl. & N. 312.

"An improvement in the common anvil or swedge-block, for the purpose of welding up and reforming the ends of railroad rails," is a patent in which special devices

are described as combined and arranged in a particular manner, and as operating in a special and peculiar way for a special purpose, and to effect a special result. It is not a claim for any kind of movable press-block, combined and operating in any way with any kind of fixed block to accomplish any purpose, or effect any kind of result. *Tarrill v. The Michigan, &c.* 1 Wall. 491.

The subsequent grant of four patents, reissues, on an original patent of a certain date, will, by relation, sustain a declaration, that a certain improvement, containing one principal and three distinct minor improvements, was patented at that date; the specification of the original having described only the improvements specified in the four reissues. *Read v. Bowman*, 2 Wall. 591

showed, that the inner sides of the cable-holder and the scallops were not to be parallel, but should converge towards the centre of the cable-holder. In an action for an infringement of the patent, it was proved, that the specification and drawing would enable a competent workman to make a cable-holder, which would hold chains of different sizes. Held, that the specification did not sufficiently describe the nature of the invention; that it was at least ambiguous, whether it was an invention of a cable-holder to hold one cable of whatever size, or to hold cables of different sizes, and it was therefore bad.¹ So A obtained a patent for "an improved turning-table for railway purposes," and in his specification gave a description of the machinery, of which no part was in fact new, except certain suspending rods. The combination, however, was both new and useful. In the specification, the patentee claimed as his invention the "improved turning-table hereinbefore described, such my invention being to the best of my knowledge and belief entirely new." Held, the specification was insufficient, for not showing what was new and what old.²

§ 25. It has been held that the construction of the specification is for the Court, unless parol evidence be introduced.³ So, that the sufficiency of the specification is for the Court, except in reference to technical terms, and the testimony of experts.⁴ So the meaning of technical words.⁵ But on the other hand it is held, that the sufficiency of a description is for the jury.⁶ So the question, which of the described parts are necessary to produce the result.⁷

§ 26. As already suggested, an *excessive* claim in the specification is held to be bad.⁸ And, if the inventor of an improvement obtain a patent for the whole machine, or mix up the new and old discoveries, or incorporate in his specification inventions neither new nor his own; the patent is wholly void.⁹ So unless it appear, whether the patent is for a *new combination* or *new parts*.¹⁰ And the description must distinguish new from old.¹¹

¹ Hastings v. Brown, 16 Eng. L. & Eq. 272.

² Holmes v. The London, &c. 16 Ib. 409.

³ Davoll v. Brown, 1 W. & M. 53.

⁴ Brooks v. Jenkins, 3 McLean, 432.

⁵ Washburn v. Gould, 3 Story, 122.

⁶ Wood v. Underhill 5 How. 1; Wallington v. Dale, 16 Eng. L. & Eq. 584.

⁷ Silsby v. Foote, 14 How. U. S. 218.

⁸ Tetley v. Easton, 22 Eng. L. & Eq. 321.

⁹ Brunton v. Hawkes, 4 B. & Ald. 540; Lowell v. Lewis, 1 Mason, 182. See Wyeth v. Stone, 1 Story R. 273.

¹⁰ Hovey v. Stevens, 1 W. & M. 290. See Regina v. Bessell, 4 Eng. L. & Eq. 311.

¹¹ Brooks v. Jenkins, 3 McLean, 432.

§ 32. An assignee of a patent is not presumed to have it in his power to produce any original assignment prior to his own. Copies of such prior assignments, from the patent-office, are therefore admissible.¹

§ 33. A patentee, or his assignee, in transferring part of the patent, may reserve the right to prosecute for piracies; but, when he has divested himself of that right, by conveying all his interest in the patent within the territory transferred, the owner of the patent may thus prosecute.² And where a grant was made of a right to construct and use fifty machines, within certain localities, reserving to the grantor the right to construct, but not to use them, therein; held, the grant was of an exclusive right, under the statute of 1836, in regard to patents, and that suits were to be brought in the name of the assignees, even though agreed to be at the expense of the grantor.³ So all the assignees of a patent may join in an action for its infringement, although it be conveyed to them in separate undivided parts.⁴ But where a transfer of certain specified privileges, part of larger privileges secured by patent right, does not confer a legal title to the whole, or to an undivided portion of the right, nor grant the entire or exclusive right within a specified part of the United States; as where the holder of a patent for turning irregular forms, generally, grants to another the full and exclusive license, right, and permission to use it for turning shoe-lasts: a suit for an infringement of the privilege so transferred must be brought in the name of the original holder.⁵ And an assignee, in order to maintain an action, must have either the whole interest or the whole within a certain locality.⁶ There can be no partition except by territorial assignment.⁷ (a)

¹ *Brooks v. Jenkins*, 3 McLean, 432.

² *Bicknell v. Todd*, 5 Ib. 236.

³ *Washburn v. Gould*, 3 Story, 122.

⁴ *Stein v. Goddard*, 1 McAll. 82.

⁵ *Blanchard v. Eldridge, Wallace, Jr.* 337.

⁶ *Suydam v. Day*, 2 Blatch. 20.

⁷ *Ibid.*

three months, an unrecorded prior assignment would prevail; but it must be an assignment in writing that may be recorded within the time limited. *Gibson v. Cook*, 2 Blatch. 144.

(a) Where A granted to B license to construct and use, and vend to others to construct and use, ten planing, tonguing, and grooving machines within a particular territory, under the Woodworth patent, covenanting that B should enjoy an exclusive use to the said patent within the terri-

tory, limited to ten machines; held, a subsequent grant from A to C, of an exclusive right for the same territory, to make, use, and vend moulding planing machines under the patent, was void; B having the entire interest under the patent for that territory. *Ritter v. Serrell*, 2 Blatch. 379.

The true construction of a license given by a patentee, A, to the defendant, B, to use certain planing machines in a certain county, was held to be, that the sale of the products of the machines was restricted to

§ 34. If a license to use a patented machine be conditional, the conditions must be performed, or there will be no right to the use; and an attempt to use it will be an infringement, authorizing an injunction, as there is no adequate remedy at law. Thus where a license to use a planing machine is granted, on rendering a weekly account of the boards planed, and paying a certain sum, and other conditions; the payment must be made weekly, to authorize the use. And any alleged failure, on the part of the owner of the patent, under the license, will not authorize its use, unless the person licensed has performed all his part of the contract.¹

§ 35. It is held, that, to enable the assignee of a patent to derive any benefit in the event of a *renewal* by act of Congress, an express provision should be inserted in the grant or assignment, looking to such renewal.² (a) But the prevailing rule would seem to be more liberal in favor of an assignee. Thus an assignment of an existing patent, "to the full end of the term or terms for which letters-patent are or may be granted," embraces a subsequent *renewal* of the patent.³ And the purchaser of a patent machine has a right, after the expiration of the term for which the patent was originally granted, and the extension of the patent in favor of the patentee, to use it during an extension of such term; also to repair his own machine when necessary, although the repair consist in replacement of an essential part of the combination patented.⁴ So, when the term expires, a machine, then

¹ Brooks v. Stolley, 3 McLean, 523.

² 2 Blatch. 144.

³ Phelps v. Comstock, 4 McLean, 353; Case v. Redfield, Ib. 526.

⁴ Chaffee v. Boston, &c. 22 How. 217; Wilson v. Simpson, 9 How. U. S. 109.

the county. But, as the actual agreement between A and B at the time of the license was, that B was not to be restricted as to place in selling the products; equity would probably, on a proper application, direct the contract to be reformed by the insertion of a clause to that effect; and it would seem that the matter, entitling the party to an amendment of his contract, may be set up by way of defence to a proceeding for specific performance, where the clause omitted through mistake or accident would, if found in the instrument, constitute a ground of defence. Otherwise, where the rights of a *bona fide* purchaser have intervened, which would be seriously prejudiced by allowing the contract to be reformed, or giving effect to the defence. Woodworth v. Cook, 2 Blatch. 151.

(a) To an application for an injunction for infringement of a patent, the defendant

may set up an assignment or license from the patentee; in which assignment there was no provision looking to a renewal. The defendant claimed, that there was a mistake in the license in not containing this provision, the parties having actually agreed that the assignee should have the benefit of any extension; and prayed the court that the contract might be reformed in this particular, and that the defendant might avail himself thereof in answer to the prayer for an injunction. But, the plaintiff being the assignee of the extension of the patent for a valuable consideration and without notice, and the defendant's assignment never having been recorded, as required by the patent act of July 4, 1836, § 11; held, the injunction must be granted. Gibson v. Cook, 2 Blatch. 144.

in use under the conveyance, may without any new license or grant be employed, till it wears out or is destroyed, either by the purchaser or his assigns, notwithstanding A has obtained an extension and renewal of his patent right.¹ So, under a grant from a patentee to make, use, and sell the machine during the term of the patent, a purchaser of machines from the grantee may use the machine while it lasts, and during an extension of the patent, though such extension was not provided for when the patentee made his grant.² But where the original patentee has notice; not only of a prior invention, but of its public use, he is bound to make inquiries, and a subsequent assignee of the patent cannot affect ignorance, on applying for a confirmation of the patent after it is found on a trial at law to be void.³ (a)

§ 36. No injury is a more frequent subject of *equity* jurisdiction than the infringement of patents; usually for the purpose of a perpetual or temporary *injunction*. Upon this subject it is held, that where a court of equity, having heard a case on full proofs, is well satisfied of the originality of an invention, the regularity of a

¹ Woodworth v. Curtis, 2 W. & M. 524.

² Bloomer v. Millenger, 1 Wall. 340.

³ Honiball's Patent, 33 Eng. L. & Eq. 20.

(a) See Colt v. Young, 2 Blatch. 471; Chaffee v. Boston, &c. 22 How. 217; The Union, &c. v. Lounsbury, 42 Barb. 125.

The *surrender* of a patent, under act of July 4, 1836, § 13, is an extinguishment thereof, and at a trial before the re-issue, in a case begun before the surrender, the patentee must fail. Moffitt v. Garr, 1 Black. 273.

With regard to the *mutual* rights and obligations of the assignor and assignee of a patent; in an action on a bond, given for the purchase of a patent, in which there is no admission of the existence of the patent, or the right to sell it, the defendant is not estopped from denying its existence, its validity, or the right to sell it. Nye v. Raymond, 16 Ill. 153.

If the assignee of a patent has received profits from it, and then seeks to have the assignment rescinded for fraud, he must aver in his bill that such profits were received prior to the discovery of the fraud, and must return them, or offer so to do. Edmunds v. Myers, 16 Ill. 207.

It is held, that there is no implied warranty in the sale of a patent, that the vendor is the first inventor, or that the invention is new or useful. Hall v. Conder, 2 C. B. N. S. 22.

But where, by written contract, the plain-

tiff agreed to improve machinery for manufacturing gas, and obtain a patent therefor, and assign to the defendant one undivided half thereof; and the defendant agreed to pay the plaintiff \$1,000 when the patents were issued; and the plaintiff obtained the patent and assigned it, and brought his action for the \$1,000: held, the defendant might show, in answer to the action, that the improvement was worthless, and had been known to be so, and abandoned as such, before the patent issued. McDougall v. Fogg, 2 Bosw. 387.

A party buying a patent, with warranty that the invention is original, and on a new principle, in an action on the covenant, is not concluded by the patent from showing a breach. Wright v. Wilson, 11 Rich. 144.

The court has jurisdiction, and, on proof, the plaintiff may recover. *Ibid*.

Where a patent has been assigned for certain counties, and the assignee has made large sales under it, and then applied by bill in equity to have the contract rescinded, and the consideration returned, upon the ground of misrepresentation and fraud, but making no offer to account for the sales; a decree, ordering such rescission and repayment, is erroneous, inasmuch as it fails to restore the vendor to his rights in an equal degree. *Ibid*.

patent, and the fact of infringement, it will not send the case to a jury to have its verdict, prior to granting a perpetual injunction. It will grant it at once, especially if the questions in the case, though questions of fact, are of that kind that the Court can decide them on the testimony of men of science, as well as or better than a jury; and where a jury trial would be long, costly, or troublesome.¹ Thus, where a patent had been in force for twelve years, and had been the subject of four suits against different persons, all of which terminated favorably to the patentee, and in two of which verdicts had been given in favor of the validity of the patent; it was held, that, in a fifth case, the patentee was entitled to an injunction, pending the trial of the legal right, although a fresh fact was brought forward, tending to impeach the novelty of the invention.² So the distinction is made, that, where a patent is new, the Court considers the proof of the title in the patentee to be wanting, inasmuch as the public have had no opportunity of contesting its validity, and therefore refuses to interfere by injunction until the title has been established at law; but where there has been long enjoyment (including user) under a patent, the public have had an opportunity of contesting the patent, and the fact of their not having done so successfully is at least *prima facie* evidence that the title of the patentee is good; and the Court therefore interferes, in such a case, before the right is established at law.³ And where sufficient possession is made out, a doubt as to the validity of the patent will not necessarily prevent an injunction. The Court will look to the circumstances, and the comparative inconvenience or loss to be occasioned by granting or withholding it.⁴ But, before a patentee can have an injunction, he must show an exclusive enjoyment, long enough to justify the presumption of a right, or an incontestable right.⁵ No specified time of use is requisite. It depends on the extent as well as duration of the use or sales, the utility of the invention, the number of persons interested in questioning the right, and the completeness of acquiescence in it.⁶

¹ *Goodyear v. Day*, 2 Wallace, Jr. 283. See *Buck v. Gill*, 4 McLean, 174; *Parker v. Hatfield*, Ib. 61; *Gittins v. Symes*, 28 Eng. L. & Eq. 380; *Sargent v. Larned*, 2 Curt. 340; *Clum v. Brewer*, Ib. 506; *Woodworth v. Stone*, 3 Story, 749; *Orr v. Littlefield*, 1 W. & M. 13; *Hovey v. Stevens*, Ib. 290; *Woodworth v. Hall*, Ib. 248; *Washburn v. Gould*, 3 Story, 122.

² *Newall v. Wilson*, 19 Eng. L. & Eq. 156.

³ *Caldwell v. Van Vliessen*, 9 Eng. L. & Eq. 51. See *Foster v. Moore*, 1 Curt. 279; 2 Ib. 553.

⁴ *Sargent v. Seagrave*, 2 Curt. 553.

⁵ *Thomas v. Weeks*, 2 Paine, 92.

⁶ *Sargent v. Seagrave*, 2 Curt. 553.

§ 37. Where the right to a temporary injunction does not depend upon any controverted and doubtful facts, but upon the interpretation to be put upon a written instrument; it is the duty of the Court to interpret it, and grant or refuse the injunction accordingly.¹ And if, from the various transfers of a patent right, it be doubtful whether an action at law can be brought, so as to obtain relief for the injury complained of, equity will take jurisdiction.² But a court of equity will not enjoin the equitable owner of a patent, on the application of the legal owner.³

§ 38. Circumstances sometimes require an *account* in connection with an injunction. Thus, on a motion for a provisional injunction, the originality of the invention was strongly denied by affidavit, and it appeared that there had been three trials at law on the question of originality, in the first of which the jury found against the patent, in the second did not agree, and in the third found in its favor. The Court suspended a decision on the motion, and ordered the case to be tried by a jury, directing an account to be kept by the defendant in the mean time, and to be reported monthly, under oath, to the clerk. The question of infringement was also ordered to be tried by the same jury.⁴

§ 39. On a motion to *dissolve* an injunction, on affidavits, the defendant's proof must overcome the equity of the bill and the evidence in its support.⁵

§ 40. Where one of three parties runs a machine, and the other two own it, an injunction against the three is proper.⁶

§ 41. Where the district Judge, sitting for the Circuit Court, and being satisfied of an infringement, had granted an interlocutory injunction, till trial, to restrain the use of a machine, and the presiding Judge, after hearing the evidence before the jury on the trial, differed from his associate, who, after hearing the same evidence, still retained his former opinion, and the jury could not agree upon a verdict; it was held that the full Court, in its subsequent action on the injunction, were not bound to retain or dissolve it; and they ordered the injunction to be dissolved upon the defendant's giving security to account.⁷

¹ *Clum v. Brewer*, 2 Curt. 506.

² *Bicknell v. Todd*, 5 McLean, 236.

³ 2 Curt. 506.

⁴ *Allen v. Sprague*, 1 Blatch. 567. See *The Troy, &c. v. Corning*, 1b 467.

⁵ *Sparkman v. Higgins*, 1b. 205. See

Orr v. Merrill, 1 W. & M. 376; *Woodworth v. Stone*, 3 Story, 749.

⁶ *Woodworth v. Edwards*, 3 W. & M. 120.

⁷ *Wilson v. Barnum, Wallace, Jr.* 347.

§ 42. The district Judge, sitting for the Circuit Court, and being himself well satisfied of an infringement of a patent, although, of numerous experts examined, a majority think differently from him on that point, may grant an interlocutory injunction to restrain the use of a patented machine as an infringement of a prior one, the machine last patented not having been granted, after notice from the patent-office to the complainant to appear and be heard.¹

§ 43. With reference to the amount of *damages* for infringement of a patent, the rule is not the same where the patent is only for *an improvement*, as where the patent covers the whole machine.² The rule is, to give, not vindictive and exemplary, but actual damages, which will be the ordinary profit derived by the patentee from the sale of the article.³ Thus the evidence showed, that the patentee granted licenses for ten dollars a machine, and that the defendants had used his patent in three hundred machines, and refused to pay the usual license price; but there was no evidence of any other damage. Held, the license price fixed the rate of damages.⁴ A jury cannot allow any expenditure for counsel fees or other charges, even though necessarily incurred to vindicate the patent, and though not taxable costs.⁵ Ignorance of the existence of the patent may be considered in mitigation of damages.⁶

§ 44. With reference to *the mode of trial* in patent causes, when a claim, in the specification of a patent, without specifying the particular elements which compose the combination intended to be patented, declares that the combination is made up of so much of the described machinery as effects a particular result; it is a question of fact for the jury, which of the described parts are essential to produce that result.⁷ So the question, whether drawings, destroyed by the fire at the patent-office in 1836, were replaced within a reasonable time, so as to preclude the idea of neglect or a design to mislead the public, is a question of fact for the jury.⁸

§ 45. Parol evidence is not admissible to show at what time a patent was applied for.⁹

§ 46. The patent act contemplates two classes of persons as

¹ Wilson v. Barnum, Wallace, Jr. 347. Jr. 164; Blanchard's, &c. v. Warner, 1

² Seymour v. McCormick, 16 How. 480.

Blatch. 258.

³ Buck v. Hermance, 1 Blatch. 398;

⁶ Hogg v. Emerson, 11 How. 587.

Parker v. Corbin, 4 McLean, 462.

⁷ Silsby v. Foote, 14 How. 218.

⁴ Seymour v. McCormick, 16 How. 480.

⁸ Hogg v. Emerson, 11 How. 587.

⁵ Simpson v. The Railroads, Wallace,

⁹ Wayne v. Winter, 6 McLean, 344.

peculiarly appropriate witnesses in patent cases, viz.: 1st. Practical mechanics, to determine the sufficiency of the specification as to the mode of constructing, compounding, and using the patent. 2d. Scientific and theoretic mechanics, to determine whether the thing is substantially new in its structure and mode of operation, or a mere change of equivalents. And the second class is said to be by far the higher and more important of the two.¹

§ 47. *Oyer* of letters-patent is not demandable. And craving *oyer* does not make the specifications part of the plea.²

§ 48. It is a sufficient compliance with an order, requiring the defendant to file a monthly account, on oath, of all "iron safes hereafter manufactured or sold by him," to give the inside dimensions of the safes, without stating the prices at which they are sold, or the names of the purchasers. It is sufficient so to describe the articles, that persons in the trade can determine their value in the market, with a view to the amount of the profits.³

§ 49. Where the patentee of an invention has obtained a verdict against the defendant for infringing the patent, the Court will compel the defendant to render to the plaintiff an account of all articles made by him in imitation of the patented articles of the plaintiff, and to pay to the plaintiff a sum equal to the price of those which he had sold, and a further sum equal to the value of so many of such articles as the defendant has remaining in stock.⁴

§ 50. Under the patent law amendment act, 15 & 16 Vict. c. 83, where an action has been brought for the infringement of a patent, a retrospective account of the defendant's sales and profits of the patented article will not be granted before final judgment. Neither does the act give power to order an inspection of the defendant's books, containing entries relating to such sales. But, upon reasonable evidence of the existence of a valid patent, and of its having been infringed by the defendant, and of the defendant's making a profit by such infringement, the defendant will be ordered to keep an account of all sales to be made of the article alleged to be an infringement of the plaintiff's patent, and of the profits thereon, until the further order of the Court, upon condition of the plaintiff's waiving all right to more than nominal damages at the time of the action, and undertaking, in case the verdict and judgment

¹ *Allen v. Blunt*, 3 Story, 742.

² *Smith v. Ely*, 5 McLean, 76.

³ *Wilder v. Gayler*, 1 Blatch. 511.

⁴ *Holland v. Fox*, 25 Eng. L. & Eq. 69.

should be in favor of the defendant, to pay to the defendant the expense of keeping such account. And the 42d section of the 15 & 16 Vict. c. 83, enabling the Court, in which any action for the infringement of a patent is pending, "to make such order for an injunction, inspection, and account," as may to such Court seem fit; vests in the courts of common law the powers before exercised exclusively by courts of equity, and enables them to grant, either by interlocutory order, an account of all patent articles sold during the suit, or, after verdict for the plaintiff, and as part of the final judgment in the action, an account of all profits made by the defendant since the commencement of the action, and after notice that an account would be required. But the Court has no power, where damages, nominal or substantial, have been recovered by the plaintiff, to order an account of profits made by the defendant prior to the commencement of the suit, the damages assessed by the jury being considered as the compensation for the loss of such profits.

§ 51. An action at law for the infringement of a patent was tried, and a verdict found for the plaintiff, and a motion for a new trial on the grounds of errors in law at the trial, and of surprise in the exclusion of evidence, and of newly discovered evidence, was made and denied. After the verdict, the plaintiff filed a bill against the defendants for a perpetual injunction, founded on the verdict. An answer was put in, setting up in defence the matters urged as grounds for a new trial. After the refusal of a new trial, in the action at law, and after replication in the suit in equity, the defendants moved in the latter suit for a *feigned* issue, on the ground that they had just discovered new evidence, which went to show a want of novelty in the plaintiff's invention, and was of a different character from any before presented. Held, a proper case for a feigned issue. Also, that the defendants were entitled to amend their answer, on payment of costs, by inserting the newly discovered matter.¹

§ 52. The *jurisdiction* of the Circuit Courts, in patent cases, does not depend upon the citizenship of the parties, but upon the subject-matter. The eleventh section of the judiciary act of 1789 does not make it necessary, in such action, that either of the parties should be an inhabitant of the State where the suit is brought. It is sufficient to give jurisdiction, that the writ is served per-

¹ *Foots v. Silsby*, 1 Blatch. 545.

sonally upon the defendant in the district in which the suit is brought.¹ And where the alleged unlawful use of the machine was in Vermont, and the suit was brought in New York, it was held, that, for the purpose of restraining the use of the machine, it was only necessary for the Court to have jurisdiction of the person of the defendant. But, where it may be necessary to proceed directly against the machine itself, the proceedings must be instituted in the district in which the machine is located.²

§ 53. Analogous to a patent, is a *copyright*. (a) By virtue of acts of Congress, the authors of books, maps, charts, and musical compositions, and the inventors and designers of prints, cuts, and engravings, being citizens of, or residents in, the United States, are entitled to the exclusive right of printing and selling for twenty-eight years; and they (or their representatives, if dead) for a renewed term of fourteen years. As in the case of patents, the law prescribes certain formalities, which must be strictly observed in order to secure this exclusive privilege, and which are substantially as follows: The party, before publication, must deposit a printed copy of the title of the book in the clerk's office of the District Court of the United States for the district where he at the time resides; and notice of the copyright must be given on the title-page or page next following. He must also deliver to such clerk a copy of the book within three months after publication. The former requisitions must, in case of renewal, be complied with within six months prior to the end of the first term, and the record of renewal must within two months be published in a newspaper. (b)

¹ Allen v. Blunt, 1 Blatch. 480.

² Wilson v. Sherman, Ib. 536.

(a) See 11 Sim. 38, note. In the United States, this privilege rests wholly upon the legislation of Congress. In England, the prevailing opinion, that authors had an exclusive copyright at common law, was first definitely settled in the case of *Miller v. Taylor*, 4 Burr. 2303. The Court, however, was divided in opinion, and the decision was reversed, in the case of *Donaldson v. Becket*, 4 Burr. 2408, 7 Bro. P. C. 129, by the House of Lords, who held, that the common-law right, if any, could not be exercised beyond the statutory period.

In a late case it is said, copyright did not exist at common law—it is the crea-

ture of statute. Per *Ld. Brougham*, *Jefferys v. Boosey*, 30 Eng. L. & Eq. 1.

The decision in *Donaldson v. Becket* was affirmed in the leading case of *Wheaton v. Peters*, 8 Pet. 591.

Case is the proper form of action for breach of copyright. *Atwill v. Ferrett*, 2 Blatch. 39.

A fraudulent intention in infringing copyright is not necessary to entitle the proprietor to relief. *Clement v. Maddick*, 1 Giff. 98; 5 Jur. N. S. 592; 33 L. T. 117. See *Gambart v. Sumner*, 5 H. & N. 5.

(b) Contrary to a previous decision (*Nichols v. Ruggles*, 3 Day, 145), it is held by the Supreme Court (*Wheaton v.*

§ 54. A party is entitled to a copyright, who, by his own intellectual labor, applied to the materials of his composition, produces an arrangement or compilation new in itself. One may have a copyright for a new production, arranged or compiled from materials before known or obtained for him by the labors of others, but not for those materials in the same state in which they are furnished to him, nor for alterations and improvements made by others at his procurement and for him.¹ Whoever, by his own skill, labor, and judgment, writes a new work, may have a copyright therein, unless it be directly copied, or evasively imitated, from another work. So a new and original plan, arrangement, or combination of materials will entitle the author to a copyright therein, whether the materials themselves be new or old. Thus the plaintiff wrote an arithmetic, the plan, arrangement, and illustration of which he claimed to be new. Held, the taking thereof was a violation of his copyright, although the materials and the several particulars of his plan had existed before in separate forms and in separate works.² So it is held that some similarities, and some use of prior works, even to copying of small parts, are tolerated in some kinds of books; such as dictionaries of all descriptions, gazetteers, grammars, maps, arithmetics, almanacs, concordances, cyclopædias, itineraries, guide-books, and similar publications. But a subsequent compiler must not use so much of the arrangement and materials of a prior compilation as to show a substantial invasion, and without novelty and improvement, so as to indicate no new toil and talent. The leading inquiry, in such a case is, whether the book of the defendants, taken as a whole, is substantially a copy of the plaintiff's; whether it has substantially the same plan and motive throughout, and is intended to supersede the other in the market, with the same class of read-

¹ *Atwill v. Ferrett*, 2 Blatch. 39.

² *Emerson v. Davies*, 3 Story, 768.

Peters, 8 Pet. 591) that an observance of all the requirements of the statute is necessary to the validity of the copyright.

Under the copyright act of February 3, 1831 (4 Stat. at Large, 436), the indispensable conditions precedent to a copyright are the deposit of the title-page in the proper clerk's office, the publication of notice according to the act, and the delivery of the copy of the book.

The title-page of a book was deposited in 1846, and the notice of the entry, as

printed in the book, stated the entry to have been made in 1847. Held, the error, whether arising from mistake or not, was fatal to the title.

So where a printed copy of the book, then complete, was deposited in the clerk's office at the same time the title-page was deposited there; this fact, and a prior sale of the book, warranted the inference of an actual publication prior to the deposit, and the copyright was invalid. *Baker v. Taylor*, 2 Blatch. 82.

ers and purchasers, without introducing new matter, and with only colorable deviations. Thus where the defendant's book, called the "Flower Vase," had, like the plaintiff's book, called "Flora's Interpreter," the class, order, and description of the flower placed on the same page with its name and interpretation, instead of being in notes at the end, as in a previous work, and where it copied *verbatim* about twenty definitions out of one hundred and forty-eight, consisting of one hundred and fifty-six words in the whole volume; and, in three or four instances, some of the significations were varied in form slightly, but not in substance; and, in nineteen cases, parts of the prose descriptions, &c., were the same; but it appeared that the plaintiff had also copied other matter from previous compilers in a similar manner; and that other novelties of the plaintiff's work were not copied by the defendant; and the defendant's work was in substance original, consisting chiefly of original poetry, was much smaller than the plaintiff's, and sold at a less price: it was held, that the copying of such definitions did not, in itself, constitute a violation of the copyright; that, taken together with the copying of a new feature in the arrangement of the materials, such as the transfer of the notes from the end of the book above mentioned, both together might constitute an infringement, for which an action at law would lie; but they did not furnish sufficient ground for an injunction, especially where the arrangement pervaded the whole work, and could not be easily separated, and where there was no intention of piracy from the plaintiff's work.¹

§ 55. An *abridgment* of, or *quotations* from a work, are lawful, although they may injure the sale of the original; but a *compilation* from a book is an infringement of the copyright.² In order to maintain an action, it must be shown that the defendant has published so much of the plaintiff's work as to be a substitute for it; or has extracted so much as to impart the same knowledge, whether in the form of an abridgment or review, or by incorporating it in some larger work, and has thus substantially diminished the value of the plaintiff's work.³ And the inquiry is said to be, whether the defendant's publication is a legitimate use of the plaintiff's, in the fair exercise of a mental operation, entitling it

¹ Webb v. Powers, 2 W. & M. 497.

² Story v. Holcombe, 4 McLean, 306.

³ 2 Kent, 382; 2 Greenl. Ev. § 514;

Gray v. Russell, 1 Story, R. 11; Emerson v. Davies, 3 Story, R. 768.

to the character of an original work.¹ (a) And if one portion of a work, purporting to be an abridgment, is a compilation, and the rest a fair abridgment, an injunction will be granted against the former.²

§ 56. A prose *translation* (having no qualities of a paraphrase) of a copyright prose romance, which the author had herself caused to be translated in a way she liked, and copyrighted, is not an infringement of the copyright of the original.³ (b)

§ 56 a. It is a sufficient answer to an action for infringement and copyright, that the work was in reality an original one, but purported to be a translation.⁴

§ 57. Mere *industry* is held not to be ground for protection. Thus the publication of a *price current*, copied from a newspaper, is no infringement of copyright.⁵

§ 58. A copyright cannot subsist in a *chart*, as a general subject, although it may in the individual work, and others may be restrained from copying such work. But the natural objects from which charts are made are open to the examination of all, and any one has a right to survey, and make a chart. Hence a right in a chart is violated, only when another copies from the chart of him who has secured the copyright, and thereby avails himself of his labor and skill. And where the first and subsequent charts are in all respects alike, it is a proper subject of inquiry for a jury, whether the latter is a copy of the former, or, if there is a slight variance, whether that is colorable or not; and in cases of doubt an injunction will not be granted, until after a trial at law. Thus in an action *qui tam*, for infringement of the copyright law in

¹ Wilkins v. Aikin, 17 Ves. jun. 425.

² Story v. Holcombe, 4 McLean, 306; Webb v. Powers, 2 W. & M. 497.

³ Stowe v. Thomas, 2 Wallace, Jr. 547.

⁴ Wright v. Tallis, Man. Gr. & Scott, 893.

⁵ Clayton v. Stone, 2 Paine, 382. See Wyatt v. Barnard, 3 Ves. & B. 77.

(a) The same conceptions, clothed in the same words, must necessarily be the same composition. 2 Bl. Comm. 406.

A *colorable*, not a *real* abridgment, is held to be a violation of copyright. Gyles v. Wilcox, 2 Atk. 141; Lofft, 775. An abridgment of Johnson's *Rasselas* was held not to be an invasion of the copyright. Dodsley v. Kinneresley, Amb. 403. See Wilkins v. Aikin, 17 Ves. jun. 425; Bramwell v. Halcomb, 3 My. & Cr. 737; Gray v. Russell, 1 Story, R. 11; Roworth v. Wilkes, 1 Camp. 94.

Publication of a part of *Gray's Poems*, and of the *Paradise Lost*, was held an invasion of copyright. Mason v. Murray, cited in 1 E. 360.

Where a violation is clear, and the part copied can be easily separated, an injunction may be granted against that part. Webb v. Powers, 2 W. & M. 497.

(b) On the other hand, a copyright may be had in a translation, even though it be a gift from another. Wyatt v. Barnard, 3 Ves. & B. 77.

copying from the plaintiff's chart, drawn from a survey made at his expense — the position of George's Shoals; it was held, that the plaintiff had a right to the result of his labors and surveys; that the defendant might resort to the original materials of the chart, and survey for himself, but he could not avail himself, either in whole or in part, of the surveys of the plaintiff; and that it was a question for the jury whether the defendant had copied from the plaintiff's survey or not.¹ So *wood engravings*, printed in a book as illustrations of stories therein, and on the same sheet with the letter-press, are part of the book, and are protected by the copyright in the book; and it is not necessary that the name of the proprietor and the date of publication should be printed on each engraving, under the provisions of stat. 8 Geo. II. c. 18. And a piracy of such engravings will be restrained by injunction.²

§ 59. Where a State statute required, that the copyright in the notes, &c. of *the reports of a court*, should be taken out by the secretary in the name and for the benefit of the State; and the secretary and reporter agreed with the plaintiffs to publish the reports, and transferred to them the exclusive benefit of the State's copyright in the matter furnished by the reporter; it was held, that the plaintiffs did not thereby acquire the title to the manuscript of a volume of reports, prepared by the reporter after he ceased to be such, though in part composed of decisions made while he was in office.³ But there may be a copyright in the marginal notes of a reporter.⁴ And where the defendants, proprietors of a periodical, professing to be an analytical digest of equity, common law, and other cases, copied verbatim the head or marginal notes of cases from reports, the copyright of which was in the plaintiffs, without their consent; held, a piracy.⁵ (a)

¹ *Blunt v. Patten*, 2 Paine, 393.

⁴ *Wheaton v. Peters*, 8 Pet. 591.

² *Bogue v. Houlston*, 10 Eng. L. & Eq. 215.

⁵ *Sweet v. Benning*, 30 Eng. L. & Eq. 461.

³ *Little v. Hall*, 18 How. 165.

(a) The word "notes" in the law of New York (Acts of 1850, c. 245, § 2), includes the summary of the points decided by the court, which immediately follows the title of the suit in each case reported, and the foot-notes in the volume of reports, and the arguments of counsel. The abstracts of the pleadings, and the statements of facts which form the basis of the deci-

sions, are neither notes nor references, within the act. This act provided, that the copyright of any notes or references, made by the State reporter to any of the reports of the court of appeals, should be vested in the secretary of state for the benefit of the State, and that neither the reporter or any other person within the State should secure a copyright for the reports of the

§ 60. In reference to the mutual rights and obligations of *authors* and *publishers*, more especially as to the *extent* and *per-*

decisions, but they might be published by any person. A contracted with the State to publish the decisions for five years, with the exclusive benefit of the copyright, to be taken out in behalf of the State, of the notes and references, and other matter, furnished by the State reporter in connection with such decisions, which contract was therein declared to be an assignment and transfer to A of the copyright of the matters so published. The reporter prepared a volume of reports, and the secretary of State duly took out a copyright, in his name, in trust for the State, and the volume was published. Afterwards, and while the contract was still in force, B reprinted and published the volume. Held, A was entitled to an injunction against B to restrain him from publishing or selling such volumes, containing any of the head-notes or summary statements of points decided, or any foot-notes, copied, or taken, or colorably altered, from any book so published by A.

By the acts of April 11, 1848, and April 9, 1850, in regard to the reports of the decisions of the court of appeals, the interest of the reporter in the third volume of Comstock's Reports, as an author, passed to the secretary of State, in trust for the benefit of the State, and it was competent for that officer to take out the copyright in pursuance of the provisions of the act of Congress of 1831.

Mr. Comstock, the reporter, is the author within the act of Congress.

The right of A was not affected by the provision of the constitution, for the free publication of all judicial decisions. *Little v. Goad*, 2 Blatch. 165, 362.

It seems, that, where the proprietors of a review employ persons to write in the review, the articles written must be paid for, in order to vest the copyright in the proprietors, under stat. 5 & 6 Vict. c. 45. *Richardson v. Gilbert*, 3 Eng. L. & Eq. 268.

By stat. 5 & 6 Vict. c. 45, § 18, where the proprietor of any periodical work shall employ any person to compose any article thereof, and the same shall have been composed on the terms that the copyright therein shall belong to such proprietor, the copyright shall be the property of such proprietor. Held, that these terms need not be expressed, but may be implied. *Sweet v. Benning*, 30 Eng. L. & Eq. 461.

And, where an author is employed by the proprietor of a periodical to write for it articles on certain terms as to price, but without any mention of the copyright, it is

to be inferred that the copyright was to belong to such proprietor. *Ibid*.

In reference to copyrights in dramatic compositions, the acting of a dramatic composition has been held no breach of copyright. *Coleman v. Wathen*, 5 T. R. 245. But it was held a breach, to take down, from the mouths of the actors, the words of a drama which the author had occasionally allowed to be acted, and publish it therefrom. *Macklin v. Richardson*, Amb. 694.

The prevailing rule has since been, that chancery will enjoin the acting of a drama without the author's consent. *Eden on Injunc.* 198. But it has been decided that an action at law cannot be maintained therefor. *Murray v. Elliston*, 5 B. & Ald. 657.

By the 3 and 4 Will. IV. c. 15, § 2, persons representing dramatic pieces, without the consent in writing of the author, are made liable to certain penalties. Held, that the consent need not be in the handwriting of the author, and may be given by any agent having due authority. If not limited in its terms, it may apply as well to dramas composed after it was given, as to those which were then in existence. *Morton v. Copeland*, 32 Eng. L. & Eq. 411.

The plaintiff was a member of the Dramatic Authors' Society, which published prospectuses and rules, announcing that leave might be obtained from the secretary to represent the pieces belonging to the members, at certain prices mentioned in a list, and that lists would be published from year to year containing the names of the new pieces. In 1849, the secretary of the society gave the defendant leave in writing, signed by himself, to play "dramas belonging to the authors forming the Dramatic Authors' Society, upon his punctual transmission of the monthly bills, and payment of the prices for the performance of such dramas." In 1854, the defendant performed three pieces of the plaintiff's which were composed after 1849, and had never been published in an annual list, the society having neglected to continue the publication of annual lists since 1846. Held, that the defendant was not liable to penalties; that the document given by the secretary in 1849 amounted, under the circumstances, to a "consent in writing of the author;" that it applied to dramas which might be composed by the plaintiff after its date as well as those composed before; and that the condition on which it was given was a

manency of the privilege acquired by the latter by contracts made with the former, it is held that the construction of all contracts

condition subsequent and not precedent. *Ibid.*

A person who employs another to adapt a foreign dramatic piece for representation upon the English stage, and who has no other share in the design or execution of the work than that of suggesting the subject, is not "the author" of such adaptation within the meaning of stat. 3 and 4 Will. IV. c. 15; and therefore, when such employment is by parol, the employer has not the right of representing it, without an assignment in writing from the author. *Shepherd v. Conquest*, 33 Eng. L. & Eq. 255.

In England a class of cases is provided for by statute, somewhat intermediate between the two privileges usually termed *patent* and *copyright*.

The *copyright designs* act, 5 & 6 Vict. c. 100, § 4, excludes from the protection of the act the proprietor of any registered design applied to an article of manufacture, unless every such "article of manufacture" published by him has thereon the letters "Rd." One class of articles of manufacture mentioned in the statute is "paper-hangings." According to the usage of the trade, paper-hangings are sold for the purpose of papering rooms, in lengths of twelve yards, but it is also the practice of manufacturers to sell or otherwise issue, in the way of their trade, patterns of paper-hangings, in pieces of twenty-seven inches long, cut off from the lengths of twelve yards, and, where the design is a registered one, the practice is almost universal, of marking with the letters "Rd." each of those pattern pieces. Held, that such patterns were an "article of manufacture" within the meaning of the statute, and that a proprietor, who had issued them to the trade without such mark, was not entitled to recover against a party who had imitated the design. *Heywood v. Potter*, 16 Eng. L. & Eq. 242.

By 6 & 7 Vict. c. 65, a limited copyright is granted for "any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article," provided such design is registered. A newly-invented brick, the utility of which consisted in its being so shaped that, when several bricks were laid together in building, a series of apertures were left in the wall, by which the air was admitted to circulate, and a saving in the number of bricks required was effected, is a design capable of being registered under the above statute. *Rogers v. Driver*, 1 Eng. L. & Eq. 269.

By St. 17 Geo. III. c. 57, the owner of a copyright in a *print or engraving* may maintain an action against a person making sales of pirated copies of it, without proving their guilty knowledge of the piracy. *Gambart v. Sumner*, 5 Hurl. & Nor. 5. See § 53, n.

Questions often arise in England, in reference to the copyright privileges of *foreigners*. The English statute, unlike the act of Congress, did not discriminate between natives and foreigners. But if an author first publishes abroad, and does not use due diligence to publish in England, and another fairly publishes his work in England; it is held, that he cannot sue for a breach of copyright. 2 Kent, 379.

In 1844, the plaintiff purchased the English copyright of some musical compositions by Mendelssohn. In August of that year, the plaintiff published this music in England, and it was published simultaneously in Berlin. In 1849, there being then conflicting decisions on the question of foreign copyright in England, the defendant published the music on his own account. The plaintiff thereupon gave the defendant notice to desist from such publication, or that he would take legal proceedings against him. The defendant paid no regard to such notice. The plaintiff delayed to proceed against him. In May, 1851, the Appeal Court of the Exchequer Chamber decided in favor of the foreign copyright. The plaintiff thereupon gave another notice to the defendant to desist, and, upon his disregarding it, filed this bill for an injunction. On motion, the injunction was granted, and the plaintiff was put on terms to bring an action to try his right, if the defendant required him. *Buxton v. James*, 8 Eng. L. & Eq. 155.

An alien author first published a literary work while resident in England. A pirated edition of the same work was published at Frankfort-on-the-Main, and copies were imported into England, and sold by a London bookseller. The alien filed a bill for an injunction to restrain the sale, and, on motion, the same was granted, the plaintiff undertaking to bring an action if the defendants desired it. *Ollendorff v. Black*, 1 Eng. L. & Eq. 114.

A charge of piracy of an English book cannot be rebutted by showing that the part complained of was copied from a foreign book, which foreign book appeared to be copied from the English book. *Murray v. Bogue*, 17 Eng. L. & Eq. 165.

A published a guide-book, partly original, partly compiled, and B, who had never been in the country described, was em-

and laws in respect to copyrights should be favorable to authors, as the laws were intended for their benefit; and, when they assign their rights to others, no more must be considered as passing, than was contemplated at the time by the parties, and paid for, and clearly indicated in the contract. Thus, where A employed B to

played by C to write a guide-book to the same country, and compiled his book partly from foreign works and partly from original manuscript, and appeared to have used A's work, but not unfairly. Held, C could not be restrained from publishing the guide-book of A. *Ibid.*

The proprietor of a foreign print cannot claim copyright therein under the international copyright act, 7 & 8 Vict. c. 12, unless the date of publication and name of the proprietor are engraved on the plate, and printed on the print, as required by the 8 Geo. II. c. 13. *Avanzo v. Mudie*, 28 Eng. L. & Eq. 572.

The object of the statute of Anne, c. 19, was to encourage literature among British subjects, which description includes such foreigners, as, by residence here, owe the crown a temporary allegiance; and any such foreigner, first publishing his work in England, is an "author" within the meaning of the statute, no matter where his work was composed, or whether he came here solely with a view to its publication. *Jefferys v. Boosey*, 30 Eng. L. & Eq. 1. See 4 *Ib.* 479.

Copyright commences by publication; if at that time the foreign author is not in this country, he is not a person whom the statute meant to protect. *Ibid.*

An Englishman, though resident abroad, will have copyright in a work of his own, first published in England. *Ibid.*

B, a foreign musical composer, resident at that time in his own country, assigned to R, another foreigner, also resident there, according to the law of their country, his right in a musical composition of which he was the author, and which was then unpublished. The assignee brought the composition to England, and, before publication, assigned it, according to the forms required by the law of the country, to an Englishman. The first publication took place in England. Held, reversing the judgment of the Court of Exchequer Chamber, that the foreign assignee had not, by the law of England, any assignable copyright there in this musical composition. *Ibid.*

The following cases relate to the protection of *musical compositions*, whether in the case of foreigners or otherwise:—

In a case of alleged fraudulent imitation

of a musical publication (independently of copyright), where the Court did not consider the fraud clearly made out; held, that an injunction ought only to be continued on the terms of the plaintiff's undertaking to bring an action, and to be answerable in damages. *Chappell v. Davidson*, 8 De Gex, Macu. & Gord. 1.

Plea, that the alleged musical composition which was claimed by the plaintiff, bringing suit for infringement of his copyright, was part of a dramatic piece, to wit, &c., adapted to the stage by the defendant with the aid of scenery, dresses, &c., the general design of which representation was formed by the defendant, and that the defendant employed the plaintiff for reward to compose the musical composition as part of the representation, and that it was composed under and by virtue of the said employment, and upon the terms and for the purpose aforesaid. Held, the plea was good; for that, under the circumstances, the defendant was the author or proprietor of the whole entertainment. *Hutton v. Kean*, 7 C. B. (N. S.) 268.

One who adapts words of his own to an old air, adding thereto a prelude and accompaniment, also his own, acquires a copyright in the combination, and may, in declaring for an infringement against one who has pirated the whole, properly describe himself as the proprietor of the entire composition. *Lover v. Davidson*, 1 C. B. (N. S.) 182.

A, being in New York, and wishing to publish a song there and in London simultaneously, entered into some agreement for an assignment of the American copyright to a publisher in New York. Held, a receipt for the purchase-money was no evidence of the assignment. *Ibid.*

Held, the date on the title-page of a song (as required by the American Law) was not conclusive evidence of the time of publication in New York. *Ibid.*

The author and proprietor of copyright in a song, in the entry at Stationer's Hall, described his place of abode as "65, Oxford Street," he being in America at the time of publication, and having no place of abode in England, but "65, Oxford Street," being the address of his publishers. Held, a sufficient description to satisfy the 5 & 6 Vict. c. 45, § 13. *Ibid.*

compile a school-book, gave him some suggestions as to its character and form, and agreed to give him \$500; and B conveyed to A the copyright, and the book was published by A, calling B the author on the title-page; held, only the usual copyright for fourteen years passed under the contract, and the author, being alive at the end thereof, had the sole interest in the additional term then allowed to authors in such cases; and that a usage among booksellers, to consider the second term as passing with the first, did not control the rights of B, who was not a bookseller, nor shown to be conversant of such usage.¹

§ 61. A, an author, agreed with B, a publisher, in writing, but not under seal, that he should have the exclusive right to print and publish an edition of one thousand copies of his work, paying A fifteen cents for each copy sold; and, if B should find a second edition called for, A was to revise a copy of the first edition, which B was to stereotype at his own expense, having the exclusive control of the plates, printing as many copies as he could sell, and paying to A twenty cents for each copy sold. B took out a copyright in his own name, with the knowledge and consent of A. The first edition being sold, B called for a revised copy, which was furnished by A, and stereotype plates were prepared. A second edition of fifteen hundred copies was printed; and, subsequently, two thousand copies more were published, called in the title-page the third edition. The plates were then transferred to C, of another State, to publish, and account to B, on the same terms as those of the contract between A and B. A filed a bill against B and C, alleging that the third edition was contrary to his wishes and in fraud of his rights, and praying for an injunction to prevent their further printing or selling the third edition. The defendants filed a cross-bill, alleging the copyright to be vested in them, and praying that A might be enjoined from publishing the book as he was about to do. Held, that, as the contract did not purport to convey the copyright, but only secured to B the exclusive right to publish the work, it did not require a seal; that the copyright secured by B only protected his interest, so long as he published the work according to the contract; that B was bound to print as many copies as he could sell; that, though he could not transfer the copyright, yet he might sell the plates to C, and authorize him to publish, still accounting to A as stipulated in the

¹ *Pierpont v. Fowle*, 2 W. & M. 23.

agreement; that the second edition was not limited to the number of copies that might be struck off at one impression, but that B could increase the number as demanded by the sales, and the mere fact, of inserting in the title-page of the third impression the "third edition," was immaterial; and that A had no right to publish the work in disregard of the contract, which covered the entire printing and publishing of it.¹

§ 62. An author agreed with publishers to prepare a work, correct proofs, &c., the publishers to pay the expenses, and the profits to be divided equally; if subsequent editions should be called for, the author was to make all necessary alterations, and the publishers were to print and publish on the same conditions; the account to be finally settled at the end of five years. Two editions were published. One of the publishers retired, and a new partner was taken in. One of the new firm became bankrupt, and, by two instruments, all the interest of the new firm in the work, and the unsold copies, were assigned to the plaintiffs. A third edition was prepared by the author, and published by another publisher, and the plaintiffs filed a bill, praying an injunction and other relief. Held, the agreement between the author and original publishers was not an assignment of the copyright, but was of a personal nature, involving mutual duties and obligations, and not one that could be assigned without the author's consent. Injunction refused.²

§ 63. In reference to the *registration* of a copyright; where the first edition of a book had been published before the copyright act was passed, but subsequent editions had not been registered; it was held, that such parts of the book as were in the first edition were protected, but that no suit could be maintained as to the parts introduced in the subsequent editions.³

§ 64. A copyright may be *assigned*.⁴ Although the law requires that the assignment, as well as original grant, of a copyright, be recorded; in a suit in equity for the violation of a copyright, brought by the assignees thereof, the assignments, though not recorded, are still valid as between the parties, and as to all persons, like the defendants, not claiming under the assignors.⁵ And there may be an equitable assignment, which a court of equity

¹ *Pulte v. Derby*, 5 McLean, 328.

² *Murray v. Bogue*, 17 Eng. L. & Eq.

³ *Stevens v. Benning*, 31 Eng. L. & Eq. 165.
283.

⁴ See *Jefferys v. Boosey*, 30 Ib. 1.

⁵ *Webb v. Powers*, 2 W. & M. 497.

will notice and enforce. Thus the defendant, by an instrument in writing, not sealed or attested, so as to pass a legal copyright, agreed to assign a copyright to A for £300, with a stipulation that a deed should be executed. The price being duly paid by A, held, the effect was to vest the equitable copyright in A, who would be entitled to a decree for specific performance, and that the plaintiff was consequently entitled to succeed, upon issues denying the defendant's title to grant the copyright, and alleging that A was equitably the proprietor thereof, and had the sole right to grant permission to publish.¹ (a)

§ 65. In reference to the implied obligation or liability involved in the assignment of a copyright, the defendant, having been applied to by the plaintiff for permission to publish a work, wrote to him as follows: "You formerly made me an offer of £50 for the exclusive right of publishing, for ten years, Captain M.'s work, 'Monsieur Violet,' which offer I accepted, and wrote to you to that effect. I possess but few of the copyrights of the earlier portions of Captain M.'s works, and they are many of them published in a cheap edition. I will let you know in a few days those of the works that belong to me, that I feel disposed to offer to you. In the mean time, I shall be glad to know if you received my last letter, accepting your offer for 'Monsieur Violet,' and if not, whether you hold the same proposal." The £50 was afterwards paid, for which the defendant gave a receipt to the plaintiff, expressed to be "for permission to publish Captain M.'s work, 'Monsieur Violet,' so long as the copyright may endure, that right to be exclusively his own for ten years." Held, an express warranty by the defendant, that he had the title to the copyright.²

§ 66. As in case of patents, the most natural and effectual remedy for violation of copyright is in a court of equity. A bill in chancery, asking a disclosure and an account of sales, under the disposal of a copyright alleged to belong to the complainant, and

¹ *Simms v. Maryatt*, 7 Eng. L. & Eq. 330.

² *Simms v. Maryatt*, 7 Eng. L. & Eq. 339.

(a) An execution purchaser does not acquire the rights of an assignee of the copyright of the article sold on execution. Thus a seizure and sale on execution of the engraved plate of a map, for which the debtor has obtained a copyright, does not transfer the copyright to the purchaser;

and the debtor is entitled, without reimbursing to the purchaser the money paid by the latter on such sale, to an injunction, to restrain the purchaser from striking off and selling copies of the map, *Stephens v. Cady*, 14 How. 528; *Stephens v. Gladding*, 17 How. 447.

praying an injunction against further sales, gives, on its face, jurisdiction appropriate to chancery, and about which a remedy at law would not be so complete as accounting in equity and an injunction.¹ An injunction as a preventive remedy is more ample and appropriate than a suit at law; and hence, when it is asked, and an account and disclosure of facts desired, they will be required, in order to settle the question in controversy. But chancery cannot grant relief, on the ground that a right exists, which the party has failed to redress at law; but proper matters for the exercise of its jurisdiction must be set out and sustained.² And if no benefit or advantage whatever appears to be gained by proceedings in equity rather than at law, the bill will be dismissed without prejudice, in order that the rights of the parties may be adjusted at law. In England, where the power in chancery is concurrent with that at law, the former may, in its discretion, proceed to act in it; but in the Circuit Court it is otherwise, under the judiciary act of 1789, if the remedy be as full and perfect at law as in chancery; and the objection may sometimes be taken here under the answer, and at the hearing, as well as by demurrer.³ But where the title to the copyright under a contract of sale is also in dispute, this question may be settled in chancery, rather than send the parties to the law side of the court.⁴ (a)

§ 67. Chancery will not decree payment of a statute penalty. (b)
But *commissions* on sales must be accounted for.⁵

§ 68. In addition to the privilege of copyright, an author has a

¹ *Pierpont v. Fowle*, 2 W. & M. 23.

² *Stevens v. Gladding*, 17 How. 447;
Stevens v. Cady, 2 Curt. 200.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Stevens v. Gladding*, 2 Curt. 608.

(a) The Court will hesitate to commit a defendant, alleged to have violated an interim injunction, when he has endeavored to set himself right in respect to the original charge against him of infringing the plaintiff's copyright. *Cornish v. Upton*, 4 L. T. N. S. 862, V. C. W.

(b) Under § 6 of the act of Congress of February 3, 1831, the penalty of fifty cents, for violation of a copyright, on each sheet, whether printed or being printed, or published, or exposed to sale, does not apply to those sheets which a party had published or procured to be published, whether they were found in his possession or not; but is limited to the sheets in the possession of the party who prints or exposes them to sale. *Backus v. Gould*, 7 How. 798.

The 5 & 6 Vict. c. 45, § 2, declares the word "copyright" to mean "the sole and exclusive liberty of printing or otherwise multiplying copies" of any book, and the 3d and 4th section defines the terms for which such copyright is to exist. The 15th section provides, that, if any one print or cause to be printed, either for sale or for exportation, any book in which there is existing copyright, such offender shall be liable to a special action on the case. Held, that this provision does not restrict the right conferred by the previous sections of the act, and that the owner of copyright is entitled, by common law, to his remedy by action for the infringement of that right. *Novello v. Sudlow*, 11 Eng. L. & Eq. 492.

common-law right of property in his *manuscripts*, which will be protected by a court of equity, though, if he publishes his work, he dedicates it to the public, and cannot, by the common law, claim the exclusive right to republish it. The right of property in manuscripts is also protected by § 9 of the copyright act of 1831; and, if the whole or an important part of a work be taken and printed, chancery will enjoin its publication, on the application of the author or his legal representatives. So private letters are within the statute.¹ But a court of equity has no jurisdiction to restrain the publication of private letters, although published with the view of wounding the feelings of individuals, or of gratifying a perverted public taste, when the letters are of no value to the author as literary property; and they cannot be considered of such value to the author, when he would not willingly consent to have them published. And a court of equity will not restrain the publication of letters, upon the application of the person to whom they were written, but who has no authority, express or implied, to publish them.² So although by sending a letter the writer does not give the receiver a right to publish it; in general, chancery will not enjoin the publication of *commercial* or *friendly* letters;³ unless the publication would be a breach of trust.⁴ (a)

§ 69. The *novelty* of a work on *book-keeping* consists solely in the mode of keeping accounts—the names used in the items of debit and credit being of no importance. And it is no objection to the enjoining of its publication, without the authority of its author, that the manuscript does not contain a complete system of book-keeping.⁵ So abstracts and indices of titles to land are *property*, so long as the compiler remains owner of the unpublished manuscripts, and are the subject of copyright. “Abstracts of title” is a well-known technical term; it does not mean a mere condensed copy, but a work requiring learning, skill, and labor.⁶

¹ Bartlett v. Crittenden, 5 McLean, 32.

² Hoyt v. Mackenzie, 3 Barb. Ch. 320.

³ Perceval (Ld.) v. Phipps, 2 Ves. & B. 19; Wetmore v. Scovell, 3 Edw. 515.

⁴ 2 Ves. & B. 27; Granard (Earl of) v.

Dunkin, 1 Ball & B. 207; Gee v. Pritchard, 2 Swanst. 402. See 2 Story's Eq. 220–223.

⁵ Bartlett v. Crittenden, 5 McLean, 32.

⁶ Banker v. Caldwell, 3 Min. 94.

(a) In England, an injunction was granted against the publication of the letters of Pope, Swift, and Burns. Pope v. Curl, 2 Atk. 342; Thompson v. Stanhope, Amb. 737; Cadell v. Stewart, 1 Bell's Com. 116, n.

“At common law, an author has a right to his unpublished manuscripts the same as to any other property he may possess.” Per McLean, J., Little v. Hall, 18 How. 170.

§ 70. Property in a manuscript may be transferred or abandoned by the author, like any other property. But one who permits pupils to take copies of his manuscripts, for the purpose of instructing themselves and others, does not thereby abandon them to the public; and the publication of them will be restrained by injunction.¹ (a)

§ 71. A patent or copyright, as has been seen, is a *positive* or *conventional* privilege, derived from the government of the State. There is another somewhat analogous right, to which we have already briefly referred (see vol. i. p. 76, n.), not depending on any public grant, but wholly on the party's own private labor or skill; which, however, the law equally protects and vindicates. This is commonly called a *trade-mark*. (b) A manufacturer or a merchant for whom goods are manufactured may, by priority of appropriation of names, letters, marks, or symbols of any kind to distinguish the manufacturers, acquire a property therein, as a trade-mark, for the invasion of which an action for damages will lie, and in the exclusive use of which he may have protection, when necessary, by injunction. In all cases where names, signs, marks, brands, labels, words or devices of any kind can be advan-

¹ 2 Kent, 378.

(a) The English statute expressly prohibits such publication.

(b) See *Mullins v. The People*, 24 N. Y. (10 Smith) 399; *Sykes v. Sykes*, 3 B. & C. 541; *Blofeld v. Payne*, 4 B. & Ad. 410; *Knott v. Morgan*, 2 Keen, 213; *Morison v. Salmon*, 2 Man. & G. 385; *Stone v. Carlan*, 13 Law Rep. 360.

It is said, the law of trade-marks is of recent origin, and may be comprehended in the proposition that the dealer "has a property in his trade-mark." *Clark v. Clark*, 25 Barb. 76.

Recent cases illustrate the resemblance between trade-marks and copyrights. The registered proprietors of "Bell's Life in London and Sporting Chronicle," published weekly, at the price of 5d., filed a bill against the proprietors and publishers of a new newspaper, called "The Penny Bell's Life and Sporting News," which was published at the price of 1d. From the similarity of the two names, mistakes had occurred, and were likely to occur, on the

part of the public, and inquiries had been made at the office of "Bell's Life in London" for "The Penny Bell's Life." The Court granted an injunction, to restrain the defendants from the use of the words "Bell's Life" in the title of their newspaper. *Clement v. Maddick*, Giff. 98; 5 Jur. N. S. 592; 33 L. T. 117.

In 1857, A, being proprietor of a weekly publication, "The London Journal," the price of which was 1d., assigned his copyright and interest therein to B, for value, and covenanted not to publish, either alone or in partnership with any other person, any similar weekly periodical. In 1859, A advertised the publication of a daily newspaper, to be called "The Daily London Journal," and to be sold at 1d. Injunction ordered, upon B's undertaking to abide by any order the Court might make as to damages, and to bring an action against A within one week. *Ingram v. Stiff*, 5 Jur. N. S. 947; 33 L. T. 195, L. J.

tageously used to designate the goods or property, or particular place of business, of a person engaged in trade or manufactures, or any similar business, he may adopt and use such as he pleases, which have not been before appropriated; and no other can lawfully imitate them, and by that means sell his own goods or property, or carry on his business, as the goods, property, or business of the former.¹ The object of this privilege is, that the goods may be known as his mark in the market for which he intends them, and that he may thus secure the profits which their superior repute as his may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. Hence his own as well as the public interest requires, that he should be protected in the exclusive use of his trade-mark. And he who affixes to his own goods an imitation of an original trade-mark, by which those of another are distinguished and known, seeks, by deceiving the public, to divert and appropriate to his own use the profits, to which the superior skill of another has given him the exclusive title. Such act is a fraud upon the public and upon the owner of the trade-mark.² (a)

§ 72. An imitation is colorable, and will be enjoined, where it requires a careful inspection to distinguish it from the genuine

¹ *Stokes v. Landgraff*, 17 Barb. 608; 2 Sandf. 599. *Acc. Rodgers v. Nowill*, 5 Com. B. 109; *Sykes v. Sykes*, 3 B. & C. 541.

² *Amoskeag, &c. v. Spear*, 2 Sandf. 599.

(a) The plaintiff was a manufacturer of steel pens, which were put up in boxes. Those containing pens of the first quality were labelled No. 303; of an inferior quality, No. 753. The defendant was in the habit of removing the labels from the latter, and substituting the 303 labels, closely imitating the plaintiff's 303 labels. Held, the practice was a fraud upon the public and the plaintiff, and, being a fraud productive of damage, could be restrained by injunction. *Gillott v. Kettle*, 3 Duer, 624. See *Coffeen v. Brunton*, 5 M'Lean, 256.

In an action for a penalty under 5 & 6 Will. IV., c. 83, § 6, for putting on an article, made according to a patent, the words "K. & G. Patent Elastic," without the license of the patentee; it is no defence, "that the invention was not a new manufacture." But it is necessary to prove that such words did imitate, and were so put on by the defendant "with a view of imitating," the mark of the patentee. *Myers v. Baker*, 3 Hurl. & Nor. 802.

The name of "Roger Williams Long Cloth" may be appropriated by a manufacturer to cotton cloth of his manufacture, to distinguish it from cloth of the same general description manufactured by others; and if, to the knowledge of the public, it be so appropriated by the plaintiff, a person who stamps the name of "Roger Williams" on his cloth of similar description, with the design and effect of fraudulently passing it upon the public as and for cloth manufactured by the plaintiff, to the lessening of the gains and credit as a manufacturer of the latter, is liable to him for the injury caused thereby. *Barrows v. Knight* 6 R. I. 434.

A perpetual injunction was granted, to restrain the use by the defendant of the plaintiff's trade-mark, and an account of the profits accruing from the use of such trade-mark for six years prior to the filing of the bill, although the defendant was not aware that such trade-mark was the property of the plaintiff or of any other person. *Cartier v. Cartile*, 8 Jur. n. s. 183.

article. On a bill to restrain one from the use of trade-marks, the question is not, whether the complainant was the original inventor of the mark; nor whether the article sold under the pirated mark is of equal value with the genuine; but the ground is, that the complainant has an interest in the good-will of his trade or business, and, having taken a particular label, or sign, indicating that the article sold under it was made by him, and sold under his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to pirate upon the good-will of his friends or customers, by using such label, or sign, without his consent or authority.¹ And where one intentionally uses, or closely imitates, another's trade-marks on merchandise or manufactures, the law presumes that he did it fraudulently, for the purpose of inducing the public, or those dealing in the article, to believe that the goods are those made and sold by the latter, and of supplanting him in the good-will of his trade or business.² And that the plaintiff had discontinued the use of a trade-mark, does not deprive him of a right of action against the defendant, for selling articles so marked, but not manufactured by the plaintiff.³

§ 73. An imitation may be only *partial*; and, where it is so, if calculated to mislead the public, and manifestly intended for that purpose; and if the imitation is such that the success of the design is a probable or even possible consequence; an injunction will be granted. So where the public is in fact misled, whether intentionally or otherwise, by the imitation of signs or symbols, which the party who first used them had a right to appropriate.⁴

§ 74. As has been seen, upon the ground that in this class of cases there is a joint fraud and damage, for which there is no adequate remedy at law, an *injunction* will lie to restrain one in the use of the trade-mark of another;⁵ accompanied by an account for damages, and costs of suit.⁶ And where the person pirates a trade-mark, for the fraudulent purpose of passing off his own article for that of him whose mark he has taken, and to supplant him in the good-will of the business, he will be liable also to respond

¹ Partridge v. Menck, 2 Sandf. Ch. 622; 2 Barb. 101; Brooklyn, &c. v. Masury, 25 Barb. 416.

² Taylor v. Carpenter, 2 Sandf. Ch. 603.
³ Lemoine v. Gauton, 2 E. D. Smith, 343.

⁴ Amoskeag, &c. v. Spear, 2 Sandf. 599; Clark v. Clark, 25 Barb. 76.

⁵ Ibid.

⁶ Coats v. Holbrook, 2 Sandf. Ch. 586; Taylor v. Carpenter, Ib. 603; 11 Paige, 292.

in damages for the injury thus caused.¹ But it is to be further observed, that, in granting an injunction in such case, great caution will be used ; and it will not be granted where the legal title is doubtful, or where it would tend to create a monopoly.² Where the case is one of doubt as to the piracy, an injunction should not be granted until the cause is heard on pleadings and proofs, or until the complainant has established his right by an action at law.³ Thus, where the mark consisted of a label in a certain form, and it was shown that, in very many instances, labels the same as, or similar to it, might be sold for a legitimate purpose ; the Court in the absence of any proof of actual fraud, refused to restrain the printing and sale of such labels, until the manufacturer, who alleged that they were used for a fraudulent purpose, had established his case by an action at law.⁴ So, on a bill to restrain the defendant from selling an almanac, alleged to be a fraudulent imitation of the complainant's ; it was held, that, the case not being clear as to the legal right, and the defendant undertaking to keep an account of his sales, the injunction ought not to be retained.⁵ And in all cases where a trade-mark is imitated, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another ; and it is only when this false representation is directly or indirectly made, and only to the extent to which it is made, that the party appealing to a court of justice can be entitled to relief. And, where an injunction is granted, it ought to be only to the extent to which the false representation is directly or indirectly made.⁶ So, if the marks used by the defendants, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, paying the attention which such persons usually do in buying the article in question ; an injunction will not be granted.⁷ And it is not enough to authorize an injunction, that the public are misled by a trade-mark imitated ; the imitation must be of some mark or sign which a person has a right to appropriate. Thus a party cannot acquire an exclusive right to the use of *the letters of the alphabet*, to designate the quality of an article.⁸ And in letters, words, marks, devices, figures, or symbols, which do not

¹ 11 Paige, 292.

² Amoskeag, &c. v. Spear, 2 Sandf. 599.

³ Partridge v. Menck, 2 Sandf. Ch. 622.

⁴ Farina v. Silverlock, 39 Eng. L. & Eq. 514.

⁵ Spottiswoode v. Clark, 2 Sandf. Ch. 628.

⁶ Amoskeag, &c. v. Spear, 2 Sandf. 599.

⁷ Partridge v. Menck, 2 Sandf. Ch. 622.

⁸ Amoskeag, v. Spear, 2 Sandf. Ch. 599.

indicate the origin or ownership of the goods or property, or particular place of business, of a person, but only the name, nature, kind, or quality of the articles, in which he deals; no property can be acquired.¹ So where the manufacturer of an article sells it under his own name, he does not thereby acquire such an exclusive right in the use of the name or title, as to prevent the use of it, without fraud, by another person having the same name, in the sale of a similar article manufactured by himself.² And the plaintiff's long *acquiescence* in the use of his private marks is sometimes relied on as a defence against a claim for relief in equity. Upon this subject it is held, that acquiescence on the part of the plaintiffs, who have obtained an injunction, in order to constitute a valid defence to a motion to commit for breach of the injunction, must be such as to amount almost to a license to use the trade-mark. But where the plaintiffs had obtained an injunction, to restrain a defendant from using one of twelve trade-marks, which they stated were all their peculiar marks, all such marks being a common name, with various additions; and the defendant, after the decree, had entered into a partnership bearing that name, which was the principal part of the prohibited mark; and that partnership used the prohibited mark for five years without interruption by the plaintiffs: the Court refused a motion to commit, but without costs.³

§ 75. With reference to the parties by and against whom this rule of law may be enforced; it is held, that an *alien* manufacturer may maintain a bill for an injunction, against a citizen of the United States, using his trade-mark.⁴ (a)

§ 76. A commission merchant, who sells a spurious article,

¹ *Stokes v. Landgraff*, 17 Barb. 608.

² *Burgess v. Burgess*, 17 Eng. L. & Eq. 257.

³ *Rodgers v. Nowill*, 17 Eng. L. & Eq. 83.

⁴ *Taylor v. Carpenter*, 11 Paige, 202; 2 W. & M. 1.

(a) The plaintiff's father prepared and sold a medicine called "Dr. Johnson's Yellow Ointment," for which no patent had been obtained; and the plaintiff, after his father's death, continued to sell the same. The defendant having sold a medicine under the same name and mark; held, no action could be maintained against him by the plaintiff. *Singleton v. Bolton*, 3 Doug. 293.

The (Mass.) Supreme Court has no power to restrain by injunction the use of a trade-mark, which consists in part of the name of one with whom a portion of the defend-

ants were formerly associated as partners, and which was invented, adopted, and used by them in his lifetime, without objection, and has been used by them ever since. But, on the application of his executors, the Court has power, under Gen. Sts. c. 56, § 4, to restrain the use of his name in their business and firm without having obtained his written consent in his lifetime, or that of his executors since his death, although such use has been continued for more than six years. *Bowman v. Floyd*, 3 Allen, 76.

knowing its character, is liable to a suit to restrain its further sale, by the proprietor of the trade-mark, and will be subjected to the costs of such suit.¹

§ 77. It is held no defence to a suit for assuming a trade-mark, that the simulated article is equal in quality to the genuine.² (a) Nor that the maker of the spurious goods, or the jobber who sells them to the retailers, informs those who purchase, that the article is spurious, or an imitation.³

§ 78. Where an action is brought for deceit in using the plaintiff's trade-marks on the defendant's goods, and selling them as and for the plaintiff's, evidence may be offered of any number of such sales, under a count for selling on a particular day, and divers other days between that and the date of the writ.⁴

§ 79. The same general principle has been applied in other cases than those of strictly trade-marks. Thus, where the proprietor of a hotel had established a high reputation for his house, under a certain name, and the same name was used by another person for another house; it was held, that the latter could be enjoined against using such name, as the case came within the principle which made trade marks personal property.⁵

§ 80. So M agreed with S, the lessee of the Revere House, a public house, to keep good horses, carriages, and drivers, on the arrival of certain trains at a railroad station, to convey passengers to the Revere House, and, in consideration thereof, S agreed to employ M to carry all the passengers from the Revere House to the station, and authorized him to put upon his coaches and the caps of his drivers, as a badge, the words "Revere House." A similar agreement, previously existing between S and B, had been terminated by mutual consent; but B still continued to use the words

¹ Coats v. Holbrook, 2 Sandf. Ch. 586.

² Ibid; Partridge v. Menck, 2 Sandf. 622; Taylor v. Carpenter, 11 Paige, 292.

³ Coats v. Holbrook, 2 Sandf. Ch. 586.

⁴ Taylor v. Carpenter, 2 W. & M. 1.

⁵ Howard v. Henriques, 3 Sandf. 725.

(a) Upon this point the following distinctions are made. If a druggist prepares a certain kind of medicine, and designates it by the name of a superior medicine, invented, prepared, and sold by the plaintiff, and sells it *as and for* the medicine prepared by the plaintiff; the plaintiff may maintain an action against him, without proof of special damage. But where certain medicines are designated by the name of the inventor, as a *generic term*, descriptive of a kind or class, the inventor is not en-

titled to the exclusive right of compounding or vending them, unless he has obtained a patent therefor; and if another person prepares such medicines of an inferior quality, and sells them, and by this means all medicines of this class are brought into disrepute, such inventor can maintain no action for any loss sustained by him, in consequence thereof, unless they are sold as and for medicines prepared by him. Thomson v. Winchester, 19 Pick. 214.

"Revere House" as a badge on his coaches and the caps of his drivers, although requested not to do so by S; and his drivers called "Revere House" at the station, and diverted passengers from M's coaches into B's. In an action on the case, brought by M against B for using said badge and diverting passengers, it was held, that M by his agreement with S had an exclusive right to use the words "Revere House," for the purpose of indicating that he had the patronage of that house for the conveyance of passengers; that, if B used those words for the purpose of holding himself out as having the patronage and confidence of that establishment, and in that way to induce passengers to go in his coaches rather than M's, this would be a fraud on the plaintiff, and a violation of his rights, for which this action would lie, without proof of actual specific damage; and that M would be entitled to recover such damages as the jury, upon the whole evidence, should be satisfied that he had sustained, and not merely for the loss of such passengers as he could prove to have been actually diverted from his coaches to the defendant's.¹ It is said by the Court, "vast numbers, no doubt, of the strangers, who are continually arriving at the stations of the various railroads of the city have a knowledge of the reputation and character of the principal hotels, and would at once trust themselves and their luggage to coachmen supposed to have the patronage and confidence of these establishments. Not only much wrong might be done to individuals situated like the plaintiffs, but great fraud and imposition might be practised upon strangers, if coachmen were permitted to hold themselves out, falsely, as being in the employment, or as having the patronage and countenance of the keepers of well-known and respectable public houses. The plaintiffs do not claim the exclusive right of using the words "Revere House;" but they do claim the exclusive right to use those words in a manner to indicate, and for the purpose of indicating, the fact that they have the patronage and countenance of the lessee of that house. The plaintiffs may well claim that they had the exclusive right to use the words "Revere House," to indicate the fact that they had the patronage of that establishment; because the evidence shows that such was the fact. The defendants have a perfect right to carry on as active and as

¹ *Marsh v. Billings*, 7 *Cust.* 822.

energetic a competition as they please. They may obtain the public patronage by the excellence of the carriages, the civility and attention of their drivers, or by their carefulness and fidelity, or any other lawful means. But they may not by falsehood and fraud violate the rights of others. The business is fully open to them, but they must not dress themselves in colors, and adopt and wear symbols which belong to others.”¹

§ 81. In a late case, the declaration stated, that the plaintiff had established a bank in London, called “The Bank of London,” and was the first person who had established a bank by or under that name, and had established it at great expense, and caused the name to be published and affixed on the offices of the bank, so that the same might be seen and known by the public, and had caused prospectuses of the bank to be printed and circulated with the said name and title of “The Bank of London” thereon, and the said bank was then commonly known by the name of, and was the only bank named or styled “The Bank of London;” whereby the plaintiff had acquired and was acquiring great gains and profits. It then proceeded to allege that the defendants, intending to injure the plaintiff in his said bank, and the said business of his said bank, afterwards, and while his said bank was the only bank named or styled “The Bank of London,” wrongfully and fraudulently established a certain other bank in London, under the name, style, and title of “The Bank of London,” in imitation of, and as representing, the said Bank of London of the plaintiff, and wrongfully and fraudulently transacted business at the said bank so established by the defendants under the said name, and under the false color and pretence that the same was the bank established by the plaintiff; and that thereby the plaintiff had been prevented from carrying on his business at the said bank so established by him, so fully and extensively as he would otherwise have done, and had been deprived of profits; and that by means of the premises divers persons were induced to believe, and did believe, that the bank so established by the defendants was the bank called “The Bank of London” established by the plaintiff. Held, that the declaration disclosed no cause of action, it not being averred that the plaintiff had ever carried on the business of a banker.

¹ Per Fletcher, J., *Marsh v. Billings*, 7 Cush. 330-332.

And it was doubted whether an action of this description will lie against a trading corporation.¹ (a)

¹ *Lawson v. The Bank of London*, 18 Com. B. 84.

(a) The use of trade-marks is somewhat analogous to that of a name, after the sale of the *good-will* of a trade or business. A vendor who has sold out his business and covenanted not to engage in it again within the limits of the city, and who afterwards with the consent of the vendee does engage in the business, can maintain an action and is entitled to an injunction to restrain a subsequent assignee of the vendee from the use of the trade-name under which the vendor had formerly transacted his business. *Howe v. Searing*, 6 Bosw. 354.

The plaintiffs and defendants carried on similar business. On the expiration of a lease of certain works to the plaintiffs, where they had carried on their business, the defendants, fifteen months afterwards, had procured a lease of them, with the exception of certain mines of clay. The defendants issued a circular and card, tending to lead the public to suppose that they had succeeded to the business of the plaintiffs, and were working the same material. Held, although the words might be literally true, yet the court would restrain the further circulating or issuing such or any similar card or circular. *Harper v. Pearson*, 3 L. T. N. S. 549.

The following recent case is reported in a newspaper:—

Mary A. Staudinger, agt. Louis Staudinger et al. Rudolph Staudinger, the plaintiff's husband, set up in 1853 the business of a restaurant at 118 Broadway, designating it by his Christian name, "Rudolph's," by which it became and is well known.

The business became very profitable, and was at his death, in April, 1861, valuable, yielding from \$10,000 to \$12,000 annual net profits.

By his will he authorized his widow to buy the business and good-will from his executors.

She did so purchase, and soon after took in as a partner for one year, ending May 1, 1862, the defendant, Louis Staudinger, a brother of Rudolph's, who, in December last, procured a dissolution of the firm, and with the three other defendants, two of them brothers, and the third, Rudolph G. Staudinger, a cousin of plaintiff's husband, set up the same business at 116 Broadway, under the name of "Rudolph's Brothers."

An injunction having been granted, restraining defendants from using the name "Rudolph's" in connection with the business at 116 Broadway, the defendants moved on affidavit and on a photograph of the two buildings, to dissolve this injunction, which motion, after argument, the court denied.

CHAPTER XXIV.

TRESPASS.

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| 1. Definition, and distinction from other analogous wrongs; how far a wrongful <i>taking</i> or <i>entry</i> is necessary.
6. Parties.
7. Pleadings; declaration; <i>continuando</i> , <i>habere tenementum</i> , <i>license</i> , &c. | 13. General defence, of property in the defendant.
15. Damages.
18. Trespass upon a dwelling-house; breaking of doors; search-warrant, &c. |
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§ 1. HAVING completed our view of that class of injuries, coming under the general technical head of *Nuisance*; we proceed to the consideration of another comprehensive class, namely, *Trespass*. Trespass is defined¹ as “an unlawful act committed with violence, *vi et armis*, to the person, property, or relative rights of another.” It is also said,² that “trespass, in the most extensive sense means any injury arising to another’s person or property from the misfeasance or act of another.” And the still more extensive definition is given by Blackstone;³ “trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; whether it relates to a man’s person or his property. Therefore, beating another is a trespass; taking or detaining a man’s goods are respectively trespasses; for which an action of trespass *vi et armis*, or on the case in trover and conversion, is given by the law; so, also, non-performance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded; and, in general, any misfeasance, or act of one man whereby another is injuriously treated or damnified, is a transgression, or trespass, in its largest sense.” (a)

¹ Bouv. Law Dict. (In the ancient law it is called *transgression*. *Termes de la Ley*, 565.)

² 3 Steph. N. P. 2629.

³ 3 Comm. 208.

(a) It is perhaps worthy of notice, that this enlarged sense of the word has received the sanction of the *Divine Law*, both in the code promulgated by Moses, so often using the comprehensive formula, “if thy brother (or thy neighbor) *trespass*,” and in

the brief and simple form of prayer taught by a Higher than Moses, where *debts* and *trespasses* — in the Latin version, *debita* on the one hand, and *peccata*, *lapses*, *offenses*, on the other — are synonymously and promiscuously used.

§ 2. As already explained, however, trespass, in its strict and technical sense, is a *wrongful entry upon or taking of* real or personal property, of a *corporeal* and *tangible* nature. The respective branches of this definition distinguish it from a mere *conversion*, on the one hand, which is the subject of the action of *trover*; and from *nuisance*, (a) on the other, for which the remedy is an action on the case. (b) In our introductory view of torts or wrongs, generally (see chapters 3 and 4), we have of course treated these various injuries somewhat promiscuously, the same principles being for the most part applicable to them all. We have also treated at length the subject of trespass *to the person*. (See chapter 5.) A comparatively brief view, therefore, will be sufficient, of the precise injury which the law terms a trespass, including trespass *quare clausum fregit* and trespass *de bonis asportatis*. (c)

(a) Trespass does not lie for damage caused by building a house so near another's land, that the eaves project over and shadow and cast the water-drip upon the land. *Garraty v. Duffy*, 7 N. L. 476. See *Bangor, &c. v. Smith*, 49 Maine, 9.

(b) See *Wood v. La Rue*, 9 Mich. 158; *Cook's, &c. v. Gibson*, 21 Ind. 303; *Richardson v. Milburn*, 11 Md. 340. Where the owner of land conveys it, reserving a right of way through an avenue, and afterwards builds a house in the avenue; trespass is the proper remedy for the grantee. *Hays v. Askew*, 7 Jones, 272.

If, in an action of trespass, the facts attempted to be proved do not in law amount to a trespass; the Court should, on the defendant's motion, so inform the jury. *Crookshank v. Kellogg*, 8 Blackf. 256.

But the Court cannot, in an action of trespass *quare clausum*, draw the legal conclusion, that the acts of the defendants were a wanton trespass, from the fact that they entered without a license from the real owners. The question as to their motives is for the jury. *Longfellow v. Quimby*, 29 Maine, 196.

And where goods were distrained in a house, and the person left in possession till they were replevied suffered them to remain dispersed, as he found them, over the house, and went into all parts of it himself, no objection being made at the time; Lord Mansfield left it to the jury, in an action of trespass, as evidence of the owner's consent. *Washborn v. Black*, 11 E. 405, n.

(c) With the few differences necessarily arising from the diverse nature of real and personal estate, these actions are governed by the same general rules. And they may

be joined in one writ and even one count. See *Marble v. Keyes*, 9 Gray, 221.

Thus a count in trespass *de bon. uspor.*, for breaking down and carrying away the plaintiff's lime-kiln, may be joined with trespass *qu. claus.* *Heimer v. Wilcox*, 1 Cart. 29.

But a count for breaking and entering the plaintiff's dwelling-house, and taking and carrying away goods therefrom, is not supported by proving a trespass in taking and carrying away goods only. *Eames v. Prentice*, 8 Cush. 337.

But where the declaration contains but one count, to wit, for breaking the plaintiff's close and taking and carrying away his goods; he may amend, by filing a count simply for the same taking and carrying away of the same goods. *Bishop v. Baker*, 19 Pick. 117.

And where the writ mentions a trespass with force and arms upon the storehouse of the plaintiff, and a seizure and destruction of goods, it covers a transitory as well as a local action; actions of trespass, except those for injury to real property, being *transitory*. *M'Kenna v. Fisk*, 1 How. U. S. 241; S. C. 17 Pet. 245.

On the trial of an action of trespass *qu. claus. et de bon. uspor.*, the great questions related to the title of the personal property, and the damages claimed had reference to it alone. The cause was submitted to the jury, under a charge which, if erroneous at all, was so as to certain questions relating to a breach of the plaintiff's close, and, even as to these, was favorable to the defendant. Held, after verdict for the plaintiff, that a new trial ought not to be granted. *Holly v. Brown*, 14 Conn. 255.

Questions sometimes arise, in reference

§ 3. The following distinctions may be noticed between the action of trespass and other remedies for the same injury.

§ 4. It is held that a trespass on the land of another will not amount to an *ouster*, without a knowledge thereof by the owner, either express or implied.¹

§ 5. In reference to the two actions of trespass and trover (see

¹ *Pray v. Pierce*, 7 Mass. 381.

to injuries committed upon property partaking of the character both of real and personal estate. (See chap. 18.)

If a man cut and carry away corn at the same time, it is trespass only and not felony, because it is but one act; but if he cut it and lay it by, and carry it away afterwards, it is felony. *Emmerson v. Annison*, 1 Mod. 89.

The entering upon real estate, and severing a part therefrom and carrying it away, by one continuous act, can be recovered for only by an action of trespass *quod claus*. *Sturgis v. Warren*, 11 Verm. 433.

But trespass *de bon. aspor.* may be maintained, for taking and carrying away fixtures, or the portions of a building temporarily dissevered therefrom. *Wadleigh v. Janvrin*, 41 N. H. 503.

The plaintiff hired of the defendant certain rooms in the house of the defendant at a yearly rent, with the privilege of putting a brass plate, with the plaintiff's name engraved thereon, upon the front-door, there to remain so long as the plaintiff should continue to occupy the apartments. The rent being in arrear, the defendant removed the brass plate from the door, and refused to allow the plaintiff to have access to the apartments. In trespass, charging that the defendant broke and entered the apartments of the plaintiff, and expelled him therefrom, and removed the plate, and seized and converted his goods, the defendant amongst other pleas, pleaded that the plaintiff was not possessed of the brass plate. Held, that the facts warranted the jury in finding that the defendant was guilty of breaking and entering the apartments; that the removal of the plate was properly treated as a substantive trespass, having been pleaded to as such; and that, in the absence of evidence to show that it was affixed to the freehold, it must be assumed to be a chattel only. *Lane v. Dixon*, 3 Com. B. 776.

In answer to an action of tort, commenced in the Court of Common Pleas in Massachusetts, for pulling down, taking, and carrying away "a wooden building, parcel of an estate, consisting of land and buildings thereon, standing there in the

occupation of the defendant, as tenant for term of years, the reversion whereof belonged to the plaintiffs," the defendant admits that he pulled down and removed the building, "but whether the same belonged to the plaintiffs he has no knowledge and can neither admit nor deny, but leaves the plaintiffs to prove," and justifies the removal. Held, that the action, if not an action of trespass to real estate (which it seems it was), was an action in which the title to real estate was concerned, and that the plaintiffs were therefore entitled to full costs if he prevailed, although he recovered not exceeding twenty dollars damages. *Willard v. Baker*, 2 Gray, 336.

In an action of tort for forcibly entering the plaintiff's close and taking up and converting two posts; the taking and conversion of the posts is matter of aggravation, and, though disproved, the action may be maintained. *Phelps v. Morse*, 9 Gray, 207.

As already stated, an *assault* is a *trespass* to the person, and therefore may be joined in an action even of trespass *quod claus*. To an action of tort, brought by husband and wife for breaking and entering their close and injuring the wife, the defendant pleaded soil and freehold in himself, and a receipt in full of all demands. The judge instructed the jury, that the plaintiffs jointly could not maintain this action as an action of trespass *quod claus*, but might recover for any personal injury to the wife; and the issue under this ruling was the only one submitted to the jury, who returned a verdict for the plaintiffs for twenty dollars. Held, the title to real estate was not brought in question, and the plaintiffs were therefore entitled for their costs, under Rev. Sts. c. 121, § 3, to no more than one quarter part of the damage. *Robbins v. Sawyer*, 3 Gray, 375.

Where a declaration alleges a wrongful entry of a close, with other personal injuries by way of aggravation only; it is held, that the plaintiff cannot recover damages for the personal injuries, if he fail to establish the wrongful entry, they being merely incident thereto. *Reed v. Peoria, &c.* 18 Ill 403.

ch. 25), it is held that trespass and trover are different actions in their very nature. Trover lies upon a demand and refusal, but trespass does not. Hence a judgment in trespass is not necessarily a bar to an action of trover for the same goods. Thus if, in trespass for taking cattle, the defendant justifies for a heriot, and obtains a verdict; yet, if it appear that the plaintiff mistook the nature of his action, and that he ought to have brought trover instead of trespass, this recovery cannot be pleaded in bar to trover for the cattle.¹ And the general rule is, that trespass will not lie, against a person coming to the possession of goods lawfully, for the subsequent unlawful conversion.² So it is held that, where a right to enter on land exists, certainly unless arising merely *in law*, its *abuse* by acts of wrong subsequently committed is not a trespass.³ (a) So where the defendant, claiming rent in arrear from the plaintiff, his lodger, locked the door of the room in which the plaintiff's goods were deposited, and refused to allow the plaintiff to enter and remove them, saying that he should not have them until he had paid his rent; held, the acts of the defendant did not amount to a *taking*, and trespass was not maintainable.⁴ And where one of two partners makes a general assignment, in the name of the firm, of all the partnership property, in trust for the payment of debts of the company, and delivers the property to the assignee; and the other partner, who is under age, ratifies the assignment: on coming of age he cannot maintain an action of trespass against the assignee, for the alleged unlawful taking and asportation of the property.⁵

§ 5 a. But, to maintain trespass *de bon. aspor.*, evidence of a *forcible* taking is not required.⁶ Thus a ship-owner, who refuses to carry a passenger whom he has engaged to carry, and proceeds on the voyage without giving the passenger reasonable opportunity to remove his luggage, or with the intent to carry it beyond his reach, thereby terminates the contract of carriage, and is liable in tres-

¹ Putt v. Roster, 2 Mod. 319; 3 Mod. 1.

² Bradley v. Davis, 2 Shep. 44.

³ Edelman v. Yeakel, 27 Penn. 26; Hunnewell v. Hobart, 42 Maine, 565.

⁴ Hartley v. Moxham, 3 Gale & Dav. 1;

3 Ad. & Ell. N. S. 701.

⁵ Furlong v. Bartlett, 21 Pick. 401.

⁶ Gibbs v. Chase, 10 Mass. 130.

(a) See *Trespass ab initio*.

After a delivery of goods sold, the seller cannot, on account of fraud in the contract, forbid the goods to be taken away, and bring trespass against a person taking them away. M'Carthy v. Vickery, 12 Johns. 248.

So one who receives goods as a warehouseman, from one who obtained them by the commission of a trespass, and on demand refuses to deliver them to the owner, is not liable in trespass. Trover, or detainue, is the appropriate action. Prince v. Puckett, 12 Ala. 832.

pass for the carrying away of the luggage.¹ So a deed, conveying land to a corporation, which had been delivered to an agent of the corporation for safe-keeping, was subsequently given up by him to the grantor at the grantor's request, and on the ground that he had objected to the deed at the time when it was executed. Held, that trespass might be maintained by the corporation against the grantor, at least for nominal damages.² So actual force is not necessary to constitute a trespass upon land. But every one, who enters into the possession of unoccupied lands, without right or title derived from the owner or the law, and more especially without *claim* of title, and for the purpose of keeping the true owner out of possession; is a trespasser.³ And a *peaceable* entry is held not to be one merely unaccompanied with actual violence or breach of the peace.⁴ And the *intent* is immaterial. It is enough that the act is injurious and without a justifiable cause or purpose, though done accidentally or by mistake.⁵ So a trespass may be committed by an agent.⁶ So trespass lies for an entry upon land, though beneficial to the owner.⁷ So trespass *qu. claus.* will lie, without even actual *entry* on the land; as where the defendant stood elsewhere than upon the plaintiff's land, and shot game thereon.⁸ Or where one stands on his ground or in the street, and with missiles breaks the house of another.⁹ So, where A brought an action of trespass against B, for breaking and entering his close, and cutting and carrying away certain pine timber; and the evidence tended to show that the timber was not cut on the plaintiff's land, but was drawn across it; held, the action could be maintained, even if the cutting were not upon the plaintiff's land.¹⁰ So placing a shaft from one building to another, across a passageway of which another person owns the fee, is an actionable trespass, although the shaft passes under a bridge or platform, and does not interfere with the use of the passage.¹¹

§ 5 b. And although, in general, a trespass involves an original unlawful taking or entry, yet, as in case of nuisance, so trespass is the proper remedy for wrongfully *continuing* a building on the

¹ Holmes v. Doane, 3 Gray, 328.

² Second Cong. Society v. Howard, 16 Pick. 206.

³ McCall v. Capehart, 20 Ala. 521; Newkirk v. Sabler, 9 Barb. 652; 1 Swan, 96; 15 Ill. 53.

⁴ Norvell v. Gray, 1 Swan, 96.

⁵ Cate v. Cate, 44 N. H. 211.

⁶ Allen v. Archer, 49 Maine, 346.

⁷ Parker v. Griswold, 17 Conn. 288.

⁸ Pickering v. Rudd, 1 Stark. 56. But see Keble v. Hickringill, 11 Mod. 74, 130.

⁹ Frewitt v. Clayton, 5 Monr. 4.

¹⁰ Brown v. Manter, 2 Fost. 468.

¹¹ Esty v. Baker, 48 Maine, 435.

plaintiff's land, for the erection of which he has already recovered compensation. A recovery, with satisfaction, even by money paid into court, for the erection, does not operate as a purchase of the right to continue the trespass; but, after notice and refusal to remove, a new action may be brought.¹ And where the bargainor in a deed, after executing a conveyance, remains in possession, and, contrary to the expressed wishes of the bargainee, cuts down timber, he is liable to an action of trespass *qu. claus.*² But although, where the rightful owner of land is dispossessed, he may maintain an action against the wrong-doer for the original trespass, he cannot, for any injury afterwards committed by such wrong-doer until he has regained possession.³ And if the defendant continues in actual possession, after a recovery and satisfaction in trespass, the plaintiff cannot maintain a second action against him for continuation of the trespass, unless he shows a title which would carry with it the constructive possession.⁴ (a) And it may be further remarked, that, in trespass *qu. claus.*, the gist of the action is the breaking and entering the plaintiff's close; *the injury done therein* is matter of aggravation only. Hence it is not an objection to the whole count, that such injury is not well laid.⁵ So a party putting a fence on, or ploughing, the land of another, although not materially injuring him, is liable as a trespasser.⁶ (b)

¹ Holmes v. Wilson, 10 Ad. & El. 503.

² Spencer v. Weatherly, 1 Jones, 327.

³ Rowland v. Rowland, 8 Ham. 40.

⁴ Segar v. Kirkley, 23 Ala. 680.

⁵ Rucker v. O'Neily, 4 Blackf. 179.

⁶ Pfeiffer v. Grossman, 15 Ill. 53.

(a) In trespass *qu. claus.* the declaration alleged, that the defendant, on a day specified, broke and entered the plaintiff's close, and ejected him therefrom, and kept and continued him so ejected from thence hitherto, whereby the plaintiff, during all that time, lost the use and benefit of said close. Held, the declaration was good; that it did not present a claim for damages for the continuance of the trespass, but only showed the character of the original trespass, as being a complete disseisin, and not a mere temporary possession. Bailey v. Butcher, 6 Gratt. 144.

In trespass for placing stumps and stakes on the plaintiff's land, the defendant paid into court 40s., which the plaintiff took out in satisfaction of that trespass. The plaintiff afterwards gave the defendant notice, that, unless he removed the stumps and stakes, a further action would be brought against him. Held, that the leaving of

the stumps and stakes on the land was a new trespass. Bowyer v. Cook, 4 Com. B. 236.

Where one, who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress; held, that at any rate he was liable in trespass *qu. claus.*, for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law. Winterbourne v. Morgan, 11 E. 395.

(b) With regard to *intention*, as affecting this action, it has been recently decided, that in trespass *qu. claus.* the intent is immaterial. Luttrell v. Hazen, 3 Sneed, 30.

But it has been held, that, in trespass against an overseer of the highway, for cutting down a tree therein, evidence is

§ 6. In reference to the *parties* to an action for trespass, we have already fully explained (chapter 19) the sufficiency and necessity of *possession*. This element, applicable to some extent to all forms of injury, is more especially so in case of trespass. The possession, however, or ownership, has reference to the time of the injury, not of the action. Thus trespass *de bon. aspor.* is rightly brought, in the name of the person who was the owner of the goods at the time of the trespass, although he may have sold them before the action was commenced. And if the vendee brings such action in the name of the vendor without authority, the defendant should make the objection at the first term. A judgment in such action, prosecuted for the benefit of the vendee, would be a bar to an action of trover subsequently brought by the vendee in his own name.¹ So, if A's personal property is attached in a suit against B, and A sells and assigns his property to a third person while it is under attachment; an action of trespass for the benefit of the vendee against the attaching officer is properly brought in the name of A.² So one who has aliened the land, before action brought, may maintain trespass *qu. claus.* for a trespass committed before alienation.³ And it may be further remarked, that in this action time is not material, (see p. 77); and, if the trespass is alleged to have been committed before the title of the plaintiff accrued, it may be proved to have been afterwards.⁴ (a)

§ 7. With reference to the *pleadings* in the action for trespass, it may be remarked, that they are for the most part required to be more accurate and technical than in other actions for tort. A few of the mere general rules may here be stated. (b)

¹ Boynton v. Willard, 10 Pick. 166.

³ M'Gran v. Bookman, 3 Hill, S. C. 265.

² Holly v. Huggeford, 8 Pick. 73.

⁴ Cooper v. Taylor, 3 Green, 455.

admissible, of improper motives, and that the act was done maliciously. But the state of feeling between the parties at the time is alone material, and not the cause or history of the quarrel. Winter v. Peterson, 4 Zab. 524.

So in an action of trespass, for pulling down a house which had been rented by the defendant to the plaintiff, testimony of a threat, that, if the plaintiff's daughter did not yield to the defendant's unchaste solicitations, he would pull down the house, is competent evidence to show the malicious feelings of the defendant, and to establish the identity of the person committing the act; and a threat to kill the daughter, if she did not yield, is also evidence to prove

the malice of the defendant. Chapman v. Kincaid, 8 Humph. 150. See Halsey v. Matthews, 3 Ind. 404.

(a) As to trespass against an *administrator*, see Perkins v. Blood, 36 Verm. 274.

(b) See Redman v. Taylor, 3 Ind. 144. Like other actions for injury to real property, the action of trespass *quare claus.* is local, and can be brought only in the county in which the trespass was committed. Haim v. Rogers, 6 Blackf. 559; Champion v. Doughty, 2 Harr. 3; Chapman v. Morgan, 2 Greene, 374.

It must be proved that the close described is within the county. Prichard v. Campbell, 5 Ind. 494.

And the plaintiff cannot prove a tres-

§ 8. With regard to the *time* of the injury, a declaration — as, for example, for cutting down trees, on several occasions — may allege the trespasses to have been committed on different days and times, but not with a *continuando*.¹ But, where a day is laid in the declaration, and from such day to the commencement of the action divers trespasses were committed, one trespass only may be proved prior to the day named, but divers may be proved within the time laid.² And, on the other hand, in trespass *qu. claus.*, alleged to have been committed *diversis diebus*, &c., if the plaintiff give evidence of one or more acts of trespass within the days specified, he shall not prove an act done at any other time; but he may waive his right to prove any act within the days, and may prove one done at any other time allowed by the statute of limitations.³ It is said, “Originally every declaration in trespass seems to have been confined to one single act of trespass. When the injury was of a kind that could be continued without intermission from time to time, the plaintiff was permitted to declare with a *continuando*, and the whole was considered as one trespass. In more modern times, in order to save the trouble and expense of a distinct writ or count for every different act, the plaintiff is permitted to declare for a trespass on divers days and times between one day and another; and such a declaration is considered as if it contained a distinct count for every different trespass. But as this is for the advantage and ease of the plaintiff, he is not obliged to avail himself of the privilege, and may still consider his declaration as containing one count only, and as confined to a single trespass — in which case the time becomes immaterial. As it would give the plaintiff an undue advantage, if he could avail himself of the declaration in both these modes, and might operate as a surprise on the defendant; the plaintiff must take his election before he begins to introduce his evidence.”⁴ (a)

¹ Rucker v. M'Neely, 4 Blackf. 179.

² United States v. Kennedy, 3 McLean, 175.

³ Pierce v. Pickens, 16 Mass. 470.

⁴ Per Jackson, J., Pierce v. Pickens, 16 Mass. 470. See Haak v. Breidenbach, 3 S. & R. 204.

pass anywhere but where it is laid in the declaration, nor lay it anywhere but where it is done. Walrond v. Van Moses, 8 Mod. 321.

(a) The levy, carrying away, and sale of a plaintiff's goods, although taking place upon different days, will constitute but one act of trespass, and the plaintiff cannot be

put to his election, as to which he will proceed upon. Browning v. Skillman, 4 Zab. 351.

Where one count alleges various trespasses upon land accompanied by particular acts of injury, a judgment for some of those acts is a bar to a subsequent action for others. Goodrich v. Yale, 8 Allen, 454.

§ 8 *a*. In general, where a particular *place* is assigned in the declaration, the trespass must be proved as laid.¹ And evidence of a trespass upon lands other than those described in the writ is not admissible.² Thus, where the owner of several closes in the same town declares, generally, that the defendant broke and entered his close in that town, and thereon committed certain acts; he may prove such acts on any one close in that town; but he must be confined to that close, whether testimony as to an entry upon another be objected to or not.³ And, in trespass for breaking the plaintiff's close, and destroying his mill-dam, evidence of a trespass committed on a part of the dam without the close is inadmissible.⁴ So, the plaintiffs being owners of a close and a mill thereon on the north side of a river, and their mill-dam being rightfully extended to land on the other side which they did not own, the defendants crossed the river below the plaintiff's land, and destroyed a part of the dam on the south side, and, having effected their object, they recrossed the river at the same place and went upon the plaintiff's close. Held, the destruction of the dam and the entry upon the close were distinct trespasses, so that a judgment for the latter would not be a bar to an action for the former.⁵ But, in trespass for breaking and entering the plaintiff's close, and destroying his mill-dam, evidence is admissible of the destruction of a dam in the same close and across the same stream, at some distance above the mill, called the false dam, and used only for stopping the water for the convenience of repairing the mill-dam below.⁶

§ 9. It has been held, that a declaration in trespass for breaking the plaintiff's close, &c., is bad, on general demurrer, if it do not describe the close.⁷ So, that the *locus in quo* ought to be designated by abutments or other description, as it stood at the time of the trespass, and not at the time of the declaration.⁸ But on the other hand it is held not necessary to describe the close, either by name or by abutments.⁹ And, in respect to the terms of description, where the declaration describes the close as bounded north on the land of an adjoining owner, it is sufficient to show that owner's land to be in any degree north.¹⁰ So it is sufficient to de-

¹ Manning v. M'Donnell, 3 Brev. 15.

² Longfellow v. Quimby, 29 Maine, 196.

³ Elliott v. Shepherd, 25 Maine, 371.

⁴ White v. Mosely, 5 Pick. 230.

⁵ Ibid. 8 Pick. 356.

⁶ Durgin v. Leighton, 10 Mass. 56.

⁷ Moody v. Hinkley, 34 Maine, 200.

⁸ Humphrey v. London, &c. 20 Eng. L. & Eq. 384.

⁹ Noyes v. Colby, 10 Fost. 143.

¹⁰ Rollins v. Varney, 2 Fost. 99.

scribe the land as abutting on a windmill, though a highway lies between.¹ So, if the land is described as part of a particular lot, and also as bounded by particular lines and monuments, evidence may be offered in reference to any land falling within such bounds, though not included in the lot named.² (a)

§ 10. In an action of trespass for taking and carrying away goods, the omission to state the *value* of the goods is matter of form only, and is cured by pleading in chief as well as by verdict, and is not a ground of exception to the admission of evidence to prove the value.³ So, in an action of trespass for an injury to cattle, without taking or converting them, the averment of value is not material. If it were, the want of it could only be taken advantage of by special demurrer.⁴

§ 11. With regard to the defence against an action for trespass, the general rule is, that every defence, which admits the defendant to have been *prima facie* a trespasser, must be specially pleaded; but a denial of the acts may be made under the general issue. So also a denial that the plaintiff had a property in the land or goods; which may be proved, under this issue, by showing a freehold and immediate right of possession in the defendant.⁵ (b) In conformity with this rule, as has been already explained (chap. 18), *title* is a good defence to an action for trespass. But, although it may be offered in evidence under the general issue, yet the plea of *liberum tenementum*, with a right of entry, is also a familiar form of defence.⁶ (c) The plea puts in issue only the

¹ Nowel v. Sands, 2 Rolle's Abr. 677.

² Poor v. Gibson, 32 N. H. 415.

³ Baker v. Baker, 13 Met. 125.

⁴ Bean v. Green, 4 Cush. 279.

⁵ 1 Chit. Pl. 437; 2 Greenl. Ev. § 625; Riley v. Denny, 2 Rich. 539.

⁶ Crockett v. Lashbrook, 5 Monr. 530.

(a) A declaration described the close as bounded northerly by land of S and others, easterly by the old N. B. Turnpike, southerly by the road leading to W., and westerly by W. River. Held, that this description sufficiently complied with a statute, which required that "the close, or place of the alleged trespass, shall be designated by name or abutments, or other proper description." Forbush v. Lombard, 13 Met. 109.

In an action of trespass, the declaration alleged, that the defendant "broke and entered the plaintiff's dwelling-house in L., being the same dwelling-house occupied by the plaintiff, with force and arms, and did then and there imprison the plaintiff for the space of one hour, without any legal or

probable cause." Held, that this was an action of trespass on real estate, *qu. claus. fregit*, and that the place of the alleged trespass was sufficiently designated by name according to the above statute. Sawyer v. Ryan, 13 Met. 144.

(b) In general, title at the time of the alleged trespass must be shown. But this rule does not apply to any mere formal authentication of title, which will be sufficient if made before the trial. Thus a judgment record, which is the evidence of such title, need not have been signed and filed at the time of the alleged trespass, if signed and filed before the trial. Van Orman v. Phelps, 9 Barb. 500.

(c) This plea may be made, though the declaration describes the close with pre

question whether the premises are the freehold of the defendant or not.¹ And it must distinctly present this question. Thus in trespass for breaking and entering the doors and windows of a meeting-house, a plea that the defendants entered as members of the religious society, peaceably, for the purpose of religious worship, as they might lawfully do, doing no unnecessary damage, which are the supposed trespasses; is bad on demurrer, in not alleging that the defendants were members of the society, and not denying the acts charged as trespasses, nor setting forth any cause in justification of them.² And the general issue and *liberum tenementum* may be pleaded together.³ (a) In which case the burden is on the plaintiff to prove his case, and he is entitled to open and close.⁴ But a plea of title alone admits the possession of the plaintiff, and he need not prove it.⁵

§ 12. On the trial of issues, on general replication to *liberum tenementum*, pleaded to two counts, the plaintiff cannot recover, unless he proves two closes, and a trespass on each, if the defendant is entitled to land in the county.⁶ But, where the declaration alleges the trespass in entering the close and dwelling-house of the plaintiff, and the defendant pleads *liberum tenementum*, he must confine his proof to the dwelling-house, and may not show title in another tenement.⁷ (b)

¹ Gilchrist v. McLaughlin, 7 Ired. 310.

² Baptist Society v. Fisher 3 Harr. 240.

³ Hext v. Jarrell, 2 Strobh. 172. See Dover School v. M'Farlan, 2 Green, 471.

⁴ Jennings v. Maddox, 8 B. Mon. 430.

⁵ Appleby v. Obert, 1 Harr. 336.

⁶ Tribble v. Frame, 7 Mon. 529.

⁷ Hope v. Cason, 3 B. Mon. 544.

cision, by metes and bounds, &c. Fisher v. Morris, 5 Whart. 358.

But, on the other hand, the plea itself is required thus to describe the close, where the nature of the defence requires a designation more particular than that in the writ. Thus the defendant pleaded, as to so much of the land described in the declaration, as lay on one side of a line set forth in a conveyance referred to, *soil and freehold*; and as to the rest of it not guilty. Held, as the plea did not describe the line by fixed monuments on the land, it was bad on demurrer. Orange v. Berry, 4 Fost. 103.

This plea is not good, to a declaration for breaking the plaintiff's close, and beating him, his servants, and horses. Tribble v. Frame, 3 Monr. 13. See Willard v. Warren, 17 Wend. 257.

(a) Where the defendants pleaded not guilty as to the force and arms, and a special justification as to the residue of the

trespass, and the jury returned a general verdict of not guilty, judgment was entered thereupon. Hodges v. Raymond, 9 Pick. 316.

But where the defendant pleaded: 1. the general issue; 2. *liberum tenementum* with a justification; and the jury returned a verdict of guilty on the first issue and not guilty on the second; held, such verdict must be set aside for uncertainty. Turner v. Beatty, 4 Zab. 644.

(b) With regard to the right of recovering for only a part of the cause of action alleged, it is no defence to an action of trespass for taking and carrying away certain articles, that the defendant owned and had a right to carry away one of them; but the plaintiff may recover for the others. Holley v. Brown, 14 Conn. 255.

If a declaration contain several counts, a plea, professing to answer the whole declaration, answering only one of the counts, and not averring the identity of the tres-

§ 13. In trespass to personal property, as well as *qu. claus.*, if the general issue alone is pleaded, and the trespass is proved or admitted, the plaintiff must have a verdict for some amount.¹ And, generally, in an action of trespass, under the plea of not guilty, the defendant cannot give in evidence matter in discharge.² Nor evidence of a former recovery.³ So a license from the plaintiff, if not specially pleaded, cannot be used in justification, but only in mitigation of damages.⁴ Though it is generally otherwise in an action brought before a justice of the peace, a license not bringing the title to the land in issue.⁵ So it has been held, in trespass *qu. claus.*, that the defendant may prove title in a third person, and a license from him, under the general issue, or plead such facts specially.⁶ (a)

¹ Hendrix v. Trapp, 2 Rich. 93.

² Austin v. Norris, 11 Verm. 38.

³ Young v. Rummel, 2 Hill, 478.

⁴ Hendrix v. Trapp, 2 Rich. 93; Hill v.

Morey, 26 Verm. 178. See Cox v. Dove, Martin, 43; Lee v. Meeker, 2 Wis. 487.

⁵ Wheeler v. Rowell, 7 N. H. 515.

⁶ Razor v. Qualls, 4 Blackf. 286.

passes described in the different counts, is bad on general demurrer; and, although it contain the averment of identity, is bad on special demurrer. Rubottom v. M'Clure, 4 Blackf. 505.

So, in trespass *qu. claus.*, where the plaintiff declares, setting out the close with abutments; upon the plea of *liberum tenementum*, it is not necessary that he should show title to every part of it; it is enough if he show title to that part of the close in which the trespass was committed. King v. Dunn, 21 Wend. 253.

So, if the plaintiff shows trespasses on different parts, the defendant will have judgment as to those parts to which he has title, and the plaintiff as to the others. Dunckle v. Wiles, 6 Barb. 515.

The plaintiff is not bound to show a trespass upon the whole premises, nor the defendant that he has a title to the whole, in order to succeed; but each may succeed *pro tanto*, according to the proof. *Ibid.*

It is said, "When the defendant, following the declaration, asserts in his plea, that the close in which, &c., is his soil and freehold, this plea means, that the part of the close so described in the declaration, on which he admits that he has done the acts complained of, was his soil and freehold. By this plea, therefore, he undertakes to prove two propositions: first, that some part of the described close belongs to him; and secondly, that it is on this part of the close, that all the acts complained of have been done. If he does this, he is entitled to the verdict; if not, the plaintiff must succeed." Per Alderson, B., Smith v. Royston, 1 Dowl. P. C. (N. S.) 124.

Where the issue in trespass *qu. claus.*, was, whether "the close in which," &c., was a certain close known by the name of B., and whether the same close, for thirty years last past and upwards, had been separate from a certain common; and the jury found that part of B. had been enclosed within thirty years, and that the alleged trespass had been committed in the enclosed part only: held, upon this finding, the defendant was entitled to the verdict. Richards v. Peake, 4 Dowl. & Ry. 572.

The plaintiff declared in trespass for breaking his close, and set out the close by abutments. The defendant justified, alleging that the said close, in which, &c., was part of an allotment of six acres made by commissioners, duly authorized, for certain purposes, in execution of which he entered. The plaintiff denied that the close in which, &c., was part of the six acres in the plea supposed to have been allotted; and thereupon issue was joined. It appeared that the close set out by abutments was not all within the allotment, but that the part in which the actual trespass occurred was within it. Held, that the justification was made out. Bassett v. Mitchell, 2 B. & Ad. 99.

If, in an action of trespass *qu. claus.*, the defendant pleads specially, that the act complained of was not committed where the plaintiff, in his declaration, alleges it was, but upon an adjoining lot, where the defendant was justified in committing such act; the plea amounts to the general issue, and the plaintiff will be entitled to judgment upon a demurrer thereto. Dorman v. Long, 2 Barb. 214.

(a) The following are enumerated as the

§ 14. It may be added in this connection, without reference to the pleadings, that, as already explained (chap. 18), it is a sufficient defence to an action of trespass, that the acts complained of were

various defences which may be set up by special plea to the action of trespass: "An excuse of the trespass, on account of a defect of fences, which the plaintiff was bound to repair, and a license from the plaintiff, and a justification under a rent-charge, or in respect of any easement or incorporeal right, as common of fishery, or of pasture, or of turbary; and a right of way, either public or private, and whether by grant, will, prescription, custom, or of necessity, must be pleaded. So the defendant must plead an entry, by authority of law without process, as that the *locus in quo* was an inn, or that the defendant entered to demand payment of his debts; or to prevent murder; or by virtue of process, civil or criminal, of a superior or inferior court, under mesne process, as a *latuit*, &c., or under final process, as a *fi. fa.*, *elegit*, &c., and in trespass to land, where a removal of personal property is also alleged, the plea should, as to the personal property, be special, and show possession of some land, &c., and justify the removal, &c., damage feasant, &c. In all actions of trespass, whether to the person, personal or real property, matters in *discharge* of the action must be pleaded; as accord and satisfaction, arbitration, release, former recovery, tender of sufficient amends, and the statute of limitations. Actions against public officers, however, are usually excepted by express statute from the requisition of special pleading." 1 Chit. Pl. 497-8.

The sale of a ticket to a concert is only a revocable license to the purchaser to enter the building, and attend the performance; and, if revoked before the performance has commenced, and before he has taken the seat to which the ticket entitles him, and he remains therein after notice of the revocation, and refuses to depart upon request, he becomes a trespasser, and may be removed by the use of necessary force; and his only remedy therefor is by an action upon the contract. *Burton v. Scherpf*, 1 Allen, 133.

The plaintiff, in 1833, covenanted with the defendant, that he and his heirs and assigns would keep open, as a public highway, a road sixteen feet wide, over his land, from a certain turnpike, to a canal basin and landing-place, which the defendant was about to construct; also to keep open, as a public highway, certain other land near the basin, from the time the canal was put in navigable order for sloops of ordinary size, forever; provided, that the

boating business was continued on the canal; the plaintiff to have the right, if it was discontinued, to shut up the highway until it was resumed. The canal was immediately after constructed, running from Long Island Sound to the basin, and the roads were opened. In 1858, the plaintiff made a fence across the first described way, which the defendant removed, and the plaintiff sued him in trespass. At this time the boating business had been destroyed by the construction of a railroad bridge across the canal below the basin, for which injury the defendant had received compensation from the railroad. A part of the basin had also been filled up, and a new landing-place made thereupon. A considerable trade in lumber was, however, kept up on the canal, and the basin continued to be used in connection with such trade. Held, the conditions were applicable only to the second, not to the first way. That, if the terms "landing-place or basin" were not merely descriptive of the place at which the road was to terminate, but of the object of the road, and limited its continuance; yet the landing-place or basin was to be considered as still existing and in use. That the defendant had a right to remove the obstruction, and was not compelled to sue upon the covenant. And that it was not necessary that, at the time of such removal, he should have been passing upon the road for the purpose of going to the basin. *Quintard v. Bishop*, 29 Conn. 366.

If a defendant justifies an alleged trespass to real estate under a deed from a former owner, under whom the plaintiff also claims, which is prior to the title relied on by the plaintiff; the plaintiff may prove that the description of the premises conveyed to the defendant, as inserted in the deed, includes two adjoining lots, and that the contract of sale related to only one of them, and did not include the *locus in quo*, that the description was fraudulently inserted in the deed without the knowledge and against the will of the grantor; and that the grantor, upon discovery of the fraud, after execution of the deed, re-entered upon the *locus*, and repossessed himself of it, and while in possession conveyed to the plaintiff; although the deed to the defendant purported to convey but one lot of land, embraced in a single description, and neither the grantor nor the plaintiff has ever offered to return to the defendant the consideration paid by him for his deed. *Walker v. Swasey*, 2 Allen, 312.

done in asserting the defendant's title to his own property. (a) Thus the landlord may peaceably enter upon a tenant at sufferance.¹ So the plaintiff placed a seine-reel on the land of the defendant near to a river, and the defendant gave him reasonable notice to remove it, and, on his neglect to remove it, cut it down and shoved it towards the river, and it floated off. Held, the defendant's acts were justifiable, and not a trespass upon the plaintiff.² So in trespass for pulling down hedges, the defendant may justify that he had a right of common in the place where, &c., and that the hedges were made upon his common, so that he could not enjoy his common *in tam amplo modo*, &c.³ So a person finding horses trespassing on his land may turn them into the highway, and is not liable, though they may be lost in consequence.⁴ So one lawfully attempting to impound cattle may use all necessary force in self-defence, and defence of his possession. And a subsequent failure to impound will not make such force a trespass *ab initio*.⁵ So in trespass for entering a yard, the defendant was allowed to plead, that he entered for the purpose of viewing a mare, then in a stable in the yard, which had been recently stolen from him.⁶ So, where the sale of a horse is procured by the fraudulent representation of the buyer, the seller, having rescinded the sale, may peaceably enter the premises of the buyer, if not forbidden, and take the horse.⁷ So if a contract by A, to erect a building on B's land, be rescinded before completion, A, or those under him, may lawfully enter on the premises of B, to remove their property intended for use in such contract, doing no unnecessary damage. And if the defence, to an action for such entry, aver that the contract was abandoned in consequence of B's interference, it is still competent to show, under such specification, that the abandonment was by mutual consent.⁸ And in general the plea of *license*, which is the technical foundation of the defence now under consideration, includes a license in *law* as well as in *fact*;

¹ *Esty v. Baker*, 50 Maine, 325.

² *Almy v. Grinnell*, 12 Met. 53; *Dean v. Comstock*, 32 Ill. 173.

³ *Mason v. Cæsar*, 2 Mod. 66.

⁴ *Humphrey v. Douglass*, 10 Verm. 71. See *Crane v. Mason*, Wright, 333.

⁵ *Barrows v. Fassett*, 36 Verm. 625. See

Cate v. Cate, 44 N. H. 211.

⁶ *Webb v. Beavan*, 6 M. & Gr. 1055.

⁷ *Wheelden v. Lowell*, 50 Maine, 499.

⁸ *Arrington v. Larrabee*, 10 Cush. 512.

(a) This defence cannot be set up by the grantee of a mere executory purchaser. *Dean v. Comstock*, 32 Ill. 173.

In trespass *qu. claus.*, the defendant may prove, in mitigation of damages, that the

trespass was not wilful and malicious; as that he entered to survey off a portion of the premises sold for quit-rents. *Machin v. Geortner*, 14 Wend. 239.

as an entry to execute legal process, or to distrain; or by a remainder-man, &c., to see whether waste has been done or repairs made; or by a commoner, to view his cattle; or by a landlord at the expiration of the lease.¹ So if the plaintiff's goods, left in the defendant's building, were an incumbrance, and he removed them to the plaintiff's close; or if the plaintiff unlawfully took the defendant's goods and conveyed them within the plaintiff's close, and the defendant thereupon, making fresh pursuit, entered and retook them; the facts may be relied upon as a license.² So, upon the ground of an implied license, a mother cannot maintain an action, as for a trespass, against the husband of her deceased daughter, who has buried the wife in a public burial-ground, for removing a stone placed at the grave by the mother, without injury, and for the purpose of substituting another.³

§ 14 a. But it is sometimes held no justification of an entry upon another's land, that the goods of the party entering were upon the land, and the owner of the goods entered to take them.⁴ More especially, if the goods were wrongfully placed upon the land, the owner has no right to retake them by force. Thus where A sent his horses and wagon on to the land of B, after being forbidden by B to do so, and the servant of A, in returning, found the fence put up at the road, so as to prevent his taking away the horses and wagon, and left them on the land and went to inform his master; held, A had no right to enter upon the land of B for the purpose of taking his team away; and, A having proceeded forcibly to tear down the fence, for the purpose of entering, that B had a right to defend his possession against such aggression, and to use as much force as was necessary therefor.⁵

§ 14 b. And the defendant, more especially in pleading, is required to show that his act, which would otherwise be a trespass, was necessary at the time, in asserting a title to his own property. Thus, to trespass for breaking and entering the plaintiff's close, called *the manor*, the defendants pleaded, first, not guilty, and second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public and common navigable river from time imme-

¹ 5 Com. Dig. 805; *Pleader*, 3 M. 35.

² *Rea v. Sheward*, 2 M. & W. 424; *Patrick v. Colerick*, 3 Ib. 483.

³ *Durrell v. Hayward*, 9 Gray, 248.

⁴ *Anthony v. Haney*, 8 Bing. 186; *Heer-*

mance v. Vernoy, 6 Johns. 5; *Williams v. Morris*, 8 M. & W. 488; 9 Barb. 652; *Blake v. Jerome* 14 Johns. 406. *Contra*, *Chambers v. Bedell*, 2 W. & S. 525.

⁵ *Newkirk v. Sabler*, 9 Barb. 652.

morial; and that there is, in that part of the port which is within the manor, a certain ancient work or erection, belonging to the said port, necessary for the preservation of the same, for the safety and convenience of the ships resorting thereto; that, this work being damaged and in decay at the said times when, &c., it became necessary that the said work should be repaired, but that the plaintiff did not nor would repair the same, but wholly neglected so to do; wherefore the defendants entered and repaired. Replication, *de injuriâ suâ*. A verdict having been found for the plaintiff on the general issue, and for the defendant on the special plea; held, that the plaintiff was entitled to judgment, notwithstanding the finding on that plea, inasmuch as it did not state that immediate repairs were necessary, or that any one bound to do so had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that the defendants had occasion to use the port.¹ (a)

§ 15. We have already referred to the subject of the *measure of damages*, in actions for torts, generally (vol. i. chap. 3). It may be here added, that, with regard to the damages in the action for trespass, conformably to the general rule, trespassers are liable for all such damages as necessarily arise from their acts. Thus they are liable, not only for the materials of a sluiceway to a mill, destroyed by them, but also for damages sustained by the owner in being deprived of the use of it.² And consequently, in trespass for taking away property, and depriving the plaintiff of the use of it, the plaintiff may prove the value of the use during the time he was deprived of the possession.³ And the defendant cannot justify, upon the ground of a benefit to the plaintiff arising from the trespass, and subsequent thereto. Thus, in trespass *qu. claus.*, it is no defence, that after breaking the plaintiff's close the defendant erected valuable buildings on the land.⁴ But where the defendant co-operated with the plaintiff's co-tenants, though wrongfully, in tearing down an old mill, in such a condition that the profits could not have exceeded the

¹ *Lonsdale (Earl) v. Nelson*, 3 D. & Ry. 556.

² *Hammat v. Russ*, 4 Shep. 171. See *Tarleton v. McGawley*, Peake, 205.

³ *Warfield v. Walter*, 11 Gill & Johns. 80.

⁴ *Haynes v. Thomas*, 7 Ind. 38.

(a) But, in trespass *qu. claus.*, if the defendants justify under a statute, authorizing a corporation to take the land for public use, the plea need not allege that the cor-

poration have taken the proper measures to ascertain the damages. Such matter, if available to the plaintiff, should be replied. *Rubottom v. M'Clure*, 4 Blackf. 505.

repairs, and erecting another more valuable in its place; it was held, in an action of trespass, that the plaintiff could only recover nominal damages.¹

§ 16. In an action of trespass for taking a slave out of the immediate possession of the plaintiff, evidence of abusive language to the plaintiff, at the time of the trespass, is admissible, to show *quo animo* the act was done, and to enhance the damages.²

§ 17. The jury, in trespass to personal property, cannot increase the amount of their verdict for the plaintiff, by an allowance of counsel fees.³ Nor, in an action of trespass for breaking and entering the dwelling-house of the plaintiff and doing other enormities to him, can he give evidence of an assault upon him.⁴

§ 18. One of the most important and frequent acts of trespass is the unlawful entry upon a party's *dwelling-house*. (a) A dwelling-house is defined as "a building inhabited by man."⁵ And a *door* is the place of usual entrance in a house.⁶ The general rule of law is, that an outer door cannot lawfully be broken, except in the service of criminal process, or of a *habere facias*.⁷ It is said, "A man's dwelling-house is his castle, not only for his own personal protection, but for the protection of his family and property therein. A defendant in an execution, by closing the outer doors of his dwelling against the sheriff, may prevent the latter from entering to make a levy on his goods."⁸ Thus in trespass, for breaking open the outer door of the plaintiff's dwelling-house, and entering therein, &c.; plea, justifying the entry generally under a *pluries fi. fa.*; demurrer, assigning for cause, that in the plea it was not averred that the outer door was open at the time the defendants entered under the writ; held, the plea was bad.⁹ So in trespass for breaking and entering the plaintiff's dwelling-house, and assaulting and imprisoning him, &c.; pleas, first, not guilty; secondly, as to all the trespasses alleged, except the break-

¹ Jewett v. Whitney, 43 Maine, 242.

² Ratliff v. Huntly, 5 Ired. 545.

³ Young v. Tustin, 4 Blackf. 277.

⁴ Sampson v. Coy, 15 Mass. 493.

⁵ Bouv. Law Dict.

⁶ Ibid.

⁷ Ibid.; 2 Tidd's Prac. 942.

⁸ Per Walworth, Ch., Curtis v. Hubbard,

⁴ Hill, 437.

⁹ Buckenham v. Francis, 11 Moo. 40.

(a) See Foster v. Kelsey, 36 Verm. 199. Entering a building or dwelling-house without license, express or implied, is a trespass, and entitles the owner to nominal damages. Brown v. Perkins, 1 Allen, 89; 12 Johns. 408.

Keeping an inn amounts to a general license; and familiar intimacy may be evidence of a general license. Adams v. Freeman, 12 Johns. 408.

ing of the house, a justification under a writ of *ca. sa.* and warrant thereon, by virtue of which the defendants entered the house, the outer door being open, and arrested the plaintiff. Replication (admitting the writ and warrant), *de injuriâ absque residuo causæ.* It was proved that the defendants, who were bailiffs, in execution of the warrant, broke open the outer door of the plaintiff's house, and so gained an entrance, and arrested him. Held, first, that the averment in the plea, that the outer door was open, was a material averment, this being a condition precedent to the defendant's right to enter and arrest the plaintiff in his house; and therefore that the plea was sufficiently traversed by the general replication, and it was not necessary to reply the breaking of the outer door; secondly, the defendants having become trespassers *ab initio* by the breaking of the door, that the jury were rightly directed, that they might (even on the plea of not guilty) give damages for all the injuries complained of in the declaration.¹ So, on the other hand, in trespass for breaking and spoiling a lock, bolt, and staple appertaining and fixed to the outer door of the plaintiff's dwelling-house, and wherewith the same was fastened; plea, that a *fi. fa.* issued against the plaintiff, and was delivered to the defendant, being a sheriff; by virtue whereof the defendant, then lawfully being in a room of the dwelling-house occupied by D as tenant to the plaintiff, peaceably entered into the residue of the dwelling-house, through the door communicating between the room and the residue, the same being then open, to take in execution the plaintiff's goods then in the dwelling-house, and did take them; and, because the outer door was shut and fastened with the lock, bolt, and staple, so that the defendant could not carry away the goods or execute the writ without opening the outer door, nor open the door without breaking the lock, &c.; and because neither the plaintiff nor any other on his behalf was in the dwelling-house, so that the defendant could request the plaintiff or such other to open the outer door, the defendant, for the purposes aforesaid, did open the outer door, and, in so doing, did necessarily break, &c., the locks, &c., doing no unnecessary damage. Held, on demurrer, that the plea was good, though it was not shown how the defendant entered into the house, nor who fastened the outer door; and that it sufficiently appeared that there was no other way of getting out.² (See § 21.)

¹ *Kerbey v. Denby*, 1 M. & W. 336.

² *Pugh v. Griffith*, 7 Ad. & Ell. 837.

§ 19. Where a person goes to the house of another, for the purpose of serving a *subpœna* upon him, and the latter is in the house at the time, these circumstances constitute a legal right to enter; and if the former finds the outer door open, and enters peacefully, he is lawfully there, and may use such force as is necessary to overcome any resistance he may meet with in the service of the *subpœna*; being liable only for an excess of violence, beyond what is necessary to overcome the resistance. And the fact, that the person having the process is ordered by the wife of the party sought to be served to leave the house, will not render him a trespasser in proceeding to serve the *subpœna*.¹

§ 20. If a dwelling-house be capable of being used as a double house, or as a distinct residence for two families, each family having an outer door, and be thus used by the families of two persons; an officer, who has an execution against one, and enters the other's outer door by consent of the latter, has no authority to break open the door of the debtor's room, which adjoins a room of the other tenant, for the purpose of arrest. But if the door of the debtor's room be of common use and passage for the families of both, at the pleasure of both, either to go out of the house through the other tenant's outer door, or as a passage-way to the interior of the house; then such door is not privileged as an outer door, and the officer may lawfully enter it forcibly for the purpose of arrest.² And it seems that a sheriff's officer, acting under civil process, after demanding admittance, may justify breaking the inner doors of the defendant's house, though he be not therein at the time.³ In the execution of criminal process, in the case of a misdemeanor, it is necessary to demand admittance, before breaking the outer door. But it is doubted whether the same rule applies in the case of felony.⁴ And if a window be open, and a bailiff put his hand in and touch one against whom he has a warrant, he is thereby his prisoner, and he may break open the door to come at him.⁵ (a)

¹ *Hager v. Danforth*, 20 Barb. 16.

² *Stedman v. Crane*, 11 Met. 295.

³ *Ratcliffe v. Burton*, 3 Bos. & Pul. 223.

⁴ *Launock v. Brown*, 2 B. & Ald. 592.

⁵ *Anon.* 7 Mod. 8.

(a) So it seems goods may be distrained or taken in execution through an open window. 1 Rolle's Abr. 671. An officer, in executing a *ca. sa.*, put his hand into the debtor's dwelling-house, by an opening in a window, caused by a pane having been

broken in the scuffle, but not by the officer, touched the debtor who was inside the house, and said "You are my prisoner." He was unable then to secure the debtor; but he thereupon broke open the outer door, and seized him. Held, the officer had acted

§ 21. In reference to the service of process, in connection with unlawful entry upon a dwelling-house ; (a) as a general rule, no one can acquire by his own illegal act a right to the custody of another's person or property.¹ Therefore where, the outer door of a dwelling-house being latched merely, the sheriff entered it contrary to the known will of the owner, and levied upon his goods therein by a *fi. fa.* ; held illegal, though the owner was not in the house at the time, and that the levy gave the sheriff no right to remove the goods. Also that even a guest in the house might lawfully resist the sheriff's attempt to remove goods thus seized, using no more force than was necessary.² But, where the mortgagee of a house entered into it with an officer, by opening the outer door thereof in the absence of the mortgagor and his family, before the condition of the mortgage was broken, and without giving notice to the mortgagor to quit, and the officer by the mortgagee's direction attached the mortgagor's goods in the house ; and the mortgagor brought an action of trespass against the mortgagee and the officer for breaking and entering the house and carrying away the goods : held, the action could not be maintained.³ And where a sheriff was lawfully in a room, occupied by an under-tenant of the plaintiff in his dwelling-house, and had entered the residue of the dwelling through an open door communicating between the two tenements, in order to seize the plaintiff's goods under a *fi. fa.* ; and, having seized the goods, was unable to carry them away without himself opening the outer door, which was locked, neither the plaintiff, nor any one on his behalf, being present, whom the sheriff could request to open the door ; held,

¹ Per Walworth, Ch., *Curtis v. Hubbard*, 4 Hill, 437.

² *Ibid.*

³ *Lackey v. Holbrook*, 11 Met. 458.

legally, the arrest having been effected by touching the debtor, and the subsequent breaking of the door being justifiable for the purpose of taking him into custody. *Sandon v. Jervis*, 1 Ell. B. & E. 935.

If one have the right to enter and take possession of premises in the occupancy of another, his entry will be legal and not contrary to the statute concerning forcible entry and detainer, if made while the other party is temporarily absent from the premises, leaving no one there, even though it be necessary to force the door. Thus the plaintiff, having the right to possession of a house occupied by the defendant, and having given him notice to quit, afterwards, while the defendant was temporarily absent from

the house (for the day only), which he had fastened upon leaving, entered by forcing open the door, placed the furniture in the street, fastened up the house, and left it. The defendant, on returning, forced open the door, and re-entered and occupied the premises. Held, the plaintiff's entry was the exercise of a legal right in a legal manner, and he could maintain trespass *qu. cl.* against the defendant for his subsequent entry. *Mussey v. Scott*, 32 Vt., 82.

(a) If bailiffs break open doors to execute process, the party injured may have an action of trespass ; but the Court will not grant an *attachment* against them, unless it appear to have been in abuse of the process of the law. 6 Mod. 105.

he was justified in breaking the outer door and the lock thereof, in order to carry away the goods.¹ (See p. 87.)

§ 22. Entry into a dwelling-house (a) is often justified by a

¹ Pugh v. Griffith, 3 Nev. & Per. 187.

(a) Under a warrant in the usual form, on a complaint for larceny, the officer is authorized to break and enter the *shop* of the person accused, and seize the chattel alleged to have been stolen. *Banks v. Farwell*, 21 Pick. 156.

In a plea of justification under a search-warrant, it is not necessary to allege that the complaint was signed, or any minute made of the day, month, and year, when it was exhibited, or that any recognizance for cost was given, or that the warrant was returned. Nor is it necessary to state the grounds of suspicion of the person praying out the warrant. *Chipman v. Bates*, 15 Verm. 51.

In an action for maliciously, and without probable cause, issuing a search-warrant to search the plaintiff's house, for goods alleged to have been stolen from the defendant; the Judge charged the jury that, in his opinion, there would be sufficient to constitute probable cause, if they believed the facts given in evidence, and left it to them on the whole of the case to find whether there had been probable cause or not; and also directed them to find for the plaintiff, if they believed that there was any malice on the part of the defendant. Held, that the direction was right, and that, the jury having found for the defendant, the Court could not interfere in granting a new trial. *Power v. Harrison*, 4 Irish L. R. 122.

Where the evidence, in an action of trespass *qu. claus.*, tended to prove, that the defendant entered the dwelling-house of the plaintiff by virtue of a search-warrant to find stolen goods, and, after the search had been concluded, and the goods had been found and taken, together with the plaintiff, before the magistrate who issued the warrant, again aided others in entering the house for the purpose of finding evidence merely against the plaintiff, to be used in convicting him of the theft; and the Court instructed the jury that, if the defendant went to the house the second time merely for the purpose of finding more evidence against the plaintiff, and assumed, as a mere pretext, to go for some other purpose, the plaintiff was entitled to recover: it was held, that there was no error in the charge. And where it appeared, in such case, that, immediately previous to the issuing of the search-warrant, the defendant said, that "he had got a place fixed for Lawton," mean-

ing the plaintiff, and the jury were instructed, that, if this was said by the defendant in reference to the prosecution, it could have no tendency to increase the damages, but that, if they believed the defendant went into the plaintiff's house merely to abuse and insult him, without any serious belief that he was guilty, it might be considered by them in estimating the damages, and the jury returned a verdict for the plaintiff; it was held, that herein there was no error. *Lawton v. Cardell*, 22 Verm. 524.

Under St. 1855 (of Mass.) c. 215, § 38, providing that "no action shall be had or maintained against any sheriff, deputy sheriff, chief of police, or deputy chief of police, or constable, or their assistants, for executing any warrant or order issued under this act [concerning the manufacture and sale of spirituous and intoxicating liquors] by any justice or court competent to try the same; nor shall any action be had or maintained against an officer for seizing, detaining or destroying any intoxicating liquor or the vessels containing it, unless such liquor and vessels were legally kept by the owner thereof," an officer and his assistants cannot justify entering a building and seizing intoxicating liquors and vessels containing the same, which were illegally kept by the owner thereof, unless the officer had, and acted under, a warrant. *Hitchcock v. Baker*, 2 Allen, 431.

A search-warrant issued by a competent tribunal will protect an officer who acts under it, although founded on an insufficient complaint. *Dwinnels v. Boynton*, 3 Allen, 310.

An officer may lawfully serve a search-warrant, which refers to an annexed complaint, on which it is founded, for a description of the place to be searched, and the property to be searched for. *Ib.*

A complaint which alleges, that "three cases of misses' and women's boots, of the value of one hundred dollars; a lot of oak tanned soles, of the value of fifty dollars; and ten sides of sole leather, of the value of forty dollars," have been stolen, contains a sufficient description of the property to authorize the issuing of a search-warrant, and to justify an officer in making search therefor, under a warrant which refers to the complaint for a description of the goods. *Ib.*

A search-warrant describing the place to

search-warrant, or other similar process to be levied upon goods therein. And where an officer seizes goods on a search-warrant, which correspond with and come within the description of those for which he is commanded by the warrant to search; he is not liable to an action, though the goods so seized by him may not be the same which were lost by the complainant.¹ (a) And, in trespass for searching the plaintiff's house *without warrant*, circumstances of reasonable suspicion, that implements or evidences of crime are there concealed, may be given in evidence in mitigation of damages.² But where no goods are found upon a search-warrant, the person upon whose oath the warrant was obtained will be liable in trespass.³ But if the officer enters the dwelling-house of the person against whom the process issues, the door being open, and without any unnecessary damage, to execute the same; the owner of the house cannot maintain trespass against the party who prays out the process, although the goods were not found.⁴

§ 23. *Arrest of the body*, as well as seizure of property, may also be set up as a justification for such entry. Thus an officer acting *bonâ fide* may break and enter another's dwelling-house to arrest

¹ *Stone v. Dana*, 5 Met. 98.

² *Simpson v. McCaffrey*, 13 Ohio, 508.

³ *Reed v. Legg*, 2 Harring. 173.

⁴ *Chipman v. Bates*, 15 Verm. 51.

be searched as "the dwelling-house of P. D., mentioned in the above information," which is annexed, and in which the place to be searched is described as "the dwelling-house of P. D. of R., in said County," will protect an officer who acts under it in searching the dwelling-house of P. S. D., in R., if that is the place intended to be searched, and there is no person in the town by the name of P. D. *Ib.*

An officer who serves a search-warrant, which commands him to search a dwelling-house therein described, for sole leather and other goods, is not rendered a trespasser *ab initio*, merely by taking and examining a case of "uppers" found in the house, and laying them down again, although they were not specifically mentioned in the warrant, and he knew they were not, if in so doing he acted in good faith; or by searching a shop without license, before searching the dwelling-house. *Ib.*

(a) See *Kent v. Willey*, 11 Gray, 368. In trespass for breaking and entering the plaintiff's house, and continuing therein from, &c., till the commencement of this

suit; the defendant, as to the continuing in the house for a part of the time, "to wit, for the space of two days," justifies as sheriff under a *fi. fa.* issued against the goods of T. K., deceased, in the hands of the plaintiff's wife, as administratrix, to be administered; and that, having just grounds to believe that there were goods in the plaintiff's house liable to be seized, he entered to search for the same, and staid therein for the space of time in the declaration mentioned, the same being a reasonable time in that behalf. The replication alleges, that the two days mentioned in the plea were an unreasonable length of time for the defendant's searching for the goods; and then new assigns. Held, on special demurrer, first, that the replication was bad, in having tendered an immaterial issue, and also as being double; secondly, that the defendant was justified in entering the plaintiff's house, by his belief that the goods were there, though that belief were not justified by the event. *Cooke v. Birt*, 1 Marsh. 333.

him on a criminal charge, although in the mistaken belief that such person is in the house at the time, provided he first requested an entrance, and be guilty of no unnecessary damage or violence.¹ But in a plea of justification by the sheriff, to an action for breaking the plaintiff's house, and breaking open the inner doors, it is not sufficient to allege, that he entered under a *capias* against one A B, the outer door being open ; and that, the rooms in the house being fastened, and having reasonable suspicion that A B was therein, the defendant broke open the same ; without averring that A B was actually in the house, or that there was a previous demand of admittance ; the sheriff being justified, or not, in entering the house of a stranger, by the event.² So a plea, justifying the breaking and entering a house, without warrant, on suspicion of felony, ought distinctly to show, not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him.³

§ 24. As already stated, the privilege connected with a dwelling-house, and the doors of such house, furnishes no protection against the execution of a writ of *habere facias*, the very precept and purpose of which is, to give possession to a judgment plaintiff of such house belonging to the judgment defendant. It is the duty of an officer, in the execution of such writ, to deliver actual and quiet possession ; and for this purpose to remove (using no more force than is necessary) all persons, especially if they claim under the judgment defendant. Hence he may enter by breaking a door which is fastened, without demand of admission, although there are persons then in the house ; provided they are there for the purpose of holding possession by force, and of opposing the officer in the execution of his precept, and it does not appear that he knew, or had any cause to suppose, that any person was in the house. And where an officer, in the execution of a writ of *habere facias possessionem* of an undivided part of a house, entered, and, by the direction of the owners of the other parts, who were also the assignees of the judgment, forcibly removed from the house a person entering without right after the entry of the officer ; held, the officer was justified, both by the order of such owners, and by the authority of his writ.⁴

§ 25. Another important inquiry, in connection with the privi-

¹ *Barnard v. Bartlett*, 10 Cush. 501.

² *Johnson v. Leigh*, 1 Marsh. 565.

³ *Smith v. Shirley*, 3 Com. B. 142.

⁴ *Howe v. Butterfield*, 4 Cush. 302.

leges incident to a dwelling-house, arises in the case of personal violence, committed by the possessor or the alleged owner, each upon the other, in attempting to regain or to hold possession of such dwelling-house. (See chap. 4, § 12; chap. 5.) It is held, that a plea of *molliter manus imposuit*, in order to turn the plaintiff out of the defendant's house, where she continued against his will, is no answer to a charge for striking the plaintiff repeated blows, and with great force and violence knocking her down several times.¹

§ 26. In an action for assault and battery committed upon the plaintiff in his dwelling-house, to a plea that the assault and battery were committed in defence of the possession of a dwelling-house, of which the defendant was seized and possessed, the replication *de injuria*, &c., is sufficient.² But if the defendant pleads, that the first assault was committed by the plaintiff, and the plaintiff replies, that the defendant broke open the dwelling-house of the plaintiff, and beat him, and that he, in defending himself against the defendant, gently laid his hands on the defendant, which was the same assault in the plea mentioned, concluding with a verification; the replication is bad, inasmuch as it does not aver distinctly, whether the plaintiff or the defendant made the first assault; and, if it means the former, it ought to have confessed and avoided in direct and unambiguous language; if the latter, it ought to have contained a general traverse, concluding to the country.³

§ 27. In trespass for assault and battery committed upon the plaintiff in his dwelling-house, the defendant cannot justify, on the ground that he was owner of the house, that the possession was unlawfully withheld from him, and that he used no more force than was necessary to enable him to enter, and to overcome the plaintiff's resistance. And where it appeared, that the plaintiff lived in the same house with his son and son's wife, that the defendant broke open the house and beat the plaintiff and his son, that the son's wife was in travail, and that this fact was made known to the defendant before he entered the house; held, the situation of the son's wife was properly admitted in evidence, to show the malice of the defendant, and the aggravated suffering of

¹ Gregory v. Hill, 8 T. R. 299 Acc. Cro. Eliz. 242.

² Flagg v. Flagg, 11 Pick. 475.

³ Sampson v. Henry, 11 Pick. 379.

the plaintiff, although it was not set forth in the declaration; but that the circumstance, that the defendant entered the house for the purpose of making an attachment, was not admissible in evidence in mitigation of damages.¹

¹ *Sampson v. Henry*, 11 Pick. 379.

CHAPTER XXV.

CONVERSION.

1. What constitutes conversion and the foundation of an action of *trover*; unlawful taking, misuse, &c.

4. Conversion in case of *bailment*.

6. Goods obtained by *threats, fraud, or mistake*.

7. Breach of trust.

8. But there must be a conversion to one's own use; not mere negligence or other wrong.

11. Conversion in case of legal process.

12. Demand and refusal, when sufficient proof of conversion.

13. When insufficient; inability of the defendant to deliver the property; doubt of the plaintiff's title; detention by legal authority, &c.

15. Nature of the property converted; real estate; choses in action, &c.

19. Parties.

22. Pleading.

27. Damages.

§ 1. ANOTHER injury to property is *Conversion*. The conversion, by one man, of another's property *to his own use*, is of course involved in a considerable proportion of the wrongs to property which we have occasion to consider; but it is also of itself constituted by the law a specific wrong, and made the subject of a special action, to wit, the action of *trover* — the French word for *find*. And it may be remarked in general, that, as the two propositions, *a trespass is committed*, and *an action of trespass may be maintained*, have the same legal signification; so, in all instances of conversion, *trover* may be brought, and, wherever *trover* lies, there has been a *conversion*. With reference to the action of *trover*, it is said, "In form, it is a fiction; in substance, it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes that the defendant might have come lawfully by it, and, if he did not, yet by bringing this action the plaintiff waives the trespass. No damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *maleficium*, and to entitle the plaintiff to recover, two things are necessary: 1st, property in the plaintiff; 2d, a wrongful conversion by the defendant."¹

§ 2. It has been already sufficiently explained — chapter 18 — that, to maintain *trover*, *property* — usually proved sufficiently by

¹ Per Ld. Mansfield, *Cooper v. Chitty*, 1 Burr, 31; 1 Bl. R. 67.

possession—must be shown in the plaintiff. We now proceed to explain the still more distinctive requisite of a *conversion* by the defendant.¹ (a)

§ 3. It was formerly held, that trover supposes a lawful coming by the goods demanded, and an unlawful conversion; as on the other hand detention against lawful demand presumed conversion.² (b) But the prevailing doctrine now is, that conversion may be inferred from the taking of property, and the neglect to return it;³ and that trover may be maintained for *taking* goods, whenever trespass will lie;⁴ (c) that not only a wrongful detention, after demand, but an unlawful taking of the goods of another, with intent to convert them to the use of the taker, or a

¹ *Mires v. Solebay*, 2 Mod. 242.

² *Golightly v. Reynolds*, Loft, 88.

³ *Stickney v. Smith*, 5 Min. 486.

⁴ *Glenn v. Garrison*, 2 Harr. 1; *State v. Patten*, 49 Maine, 383.

(a) See *Jeffries v. Great, &c.* 34 Eng. L. & Eq. 122; *Green v. Clarke*, 2 Kern. 343; *Andrews v. Shattuck*, 32 Barb. 396. A special verdict in trover must expressly find the conversion. *Stone v. Waggoner*, 3 Eng. 204.

A demand will not be effectual, unless there is a title in the plaintiff, and possession on the part of the defendant. *Beckman v. M'Kary*, 14 Cal. 250.

(b) It seems to have been the ancient rule, that a demand was necessary to trover. *Termes de la Ley*, 567. And see *Donohue v. Henry*, 4 E. D. Smith, 162.

Two parties exchanged horses; the defendant warranting his horse sound, and granting the privilege of returning her after trial, if she proved otherwise. She proved unsound, and the plaintiff in a few days returned her and demanded his own, which the defendant refused. Held, the plaintiff had a right to rescind the contract, and therefore the refusal was a conversion. *Miller v. Grove*, 18 Md. 242.

(c) Where a party becomes possessed of the property of another, for instance, of a wagon, and changes part of its appendages, by substituting whiffletrees and cleaves for those attached to it when it came into his possession; and the owner repossesses himself of the wagon, without knowledge of the change in its appendages: trespass cannot be maintained against him for the substituted articles; the remedy of the party, if any, is by action of trover. *Parker v. Walrod*, 13 Wend. 296.

"If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser and turned into money, he may maintain *trespass* for the forcible in

jury; or, waiving the force, he may maintain trover for the wrong; or, waiving the tort altogether, he may sue for money had and received." *Rodgers v. Maw*, 15 M. & W. 448.

The distinction between trover and trespass is well illustrated by the following remarks, in a case where a ferryman wrongfully put the horses of a passenger out of the boat, without further intent concerning them; and it was held, that, although the act might be a trespass, it was not a conversion: "Any asportation of a chattel for the use of the defendant or a third person, is a conversion, because it is inconsistent with the general right of dominion which the owner has in the chattel. So, if a man has possession of my chattel, and refuses to deliver it when required, that is evidence of a conversion, because there is an assertion of right inconsistent with my right of general dominion over it. So of the destruction of a chattel, the effect of which is, to deprive the owner of it altogether. But if an act is done, which does not call in question my general right of dominion over the chattel, but on the contrary, recognizes it, that is no conversion. In the present case, why were the horses removed? Was it not because they were the property of the plaintiff? The act of removal was consistent with the plaintiff's right to use them. It may be a wrongful act, for which trespass is maintainable, but it is not a conversion. A trifling injury to a carriage would be a trespass, but it would be monstrous to say, that it would form the ground of an action of trover." Per Alderson, B., *Fouldes v. Willoughby*, 1 Dowl. P. C. (N. S.) 86.

wrongful assumption of property, without manual taking or removal, if there is an attempt to dispose of them, and without demand or offer to pay charges, is itself a conversion, and not merely evidence of it.¹ So also the *misuse* of a thing, or the using of a thing without the license of the owner, or a *wrongful sale* of it.²(a) It is said, that a "person is guilty of a conversion who intermeddles with my property and disposes of it."³ And that trover "only lies, where some dominion is asserted by the defendant over the chattel which is the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is to a certain extent guilty of a conversion."⁴ So, "there must be an intention of the defendant to take to himself the property in the goods, or deprive the plaintiff of it. If the entire article is destroyed, as for instance by burning it, that

¹ See *Gilman v. Hill*, 36 N. H. 311; *Dubois v. Beaver*, 25 N. Y. (11 Smith) 123; *Clark v. Whitaker*, 19 Conn. 319; *M'Pherson v. Neuffer*, 11 Rich. 267; *Harker v. Dement*, 9 Gill, 7; *Dudley v. Sawyer*, 41 N. H. 326; *Webber v. Davis*, 44 Maine, 147. Per *Parker, C. J.*, *White v. Phelps*, 12 N. H. 385-6; *Robinson v. Skipworth*, 23 Ind. 311; *Farrington v. Payne*, 15 Johns. 431; *Brown v. Beason*, 24 Ala. 436; *St. John v. O'Connell*, 7 Port. 466; *Pharis v.*

Carver, 13 B. Mon. 236; *Maguyer v. Hawthorne*, 2 Har. 71.

² *Chapin v. Siger*, 4 McLean, 378; *Hotchkiss v. Hunt*, 49 Maine, 213; *Maguyer v. Hawthorn*, 2 Harring. 71; *Woodbury v. Long*, 8 Pick. 543.

³ Per *Ld.* *Ellenborough*, *Stevens v. Ellwall*, 4 M. & S. 261; acc. *Fuller v. Tabor*, 39 Maine, 519.

⁴ Per *Maule, J.*, *Heald v. Carey*, 11 Com. B. 993.

(a) Goods taken in the owner's lifetime, and used after his death, are converted in his lifetime. *Crossier v. Ogleby*, 1 Strange, 60.

In many cases the question of wrongful appropriation of property, so far as the right or title of the true owner is concerned, depends in part upon his *knowledge* of the unlawful interference. But, with reference to the *conversion* of personal property, it is held, that the statute of limitations is a bar to an action of trover commenced more than six years after the conversion, although the plaintiff did not know of the conversion until within that period; the defendant not having practised any fraud, in order to prevent the plaintiff from obtaining that knowledge at an earlier period. *Granger v. George*, 5 B. & C. 149.

The question of notice to the defendant may also be material. If one in possession of property, as apparent owner, sell it, trover does not lie in favor of the true owner against the purchaser, unless the latter assume dominion over the property, after notice of the plaintiff's title. *Parker v. Middlebrook*, 24 Conn. 207.

A took and carried away iron ore from the land of B, under a claim of right, and

B took a bond from A to pay the value of the ore, if finally determined to be B's property. Held, the bond was a bar to an action of trover by B against one who had purchased it of A; and the only remedy was on the bond. *Briggs, &c. v. North*, &c. 12 Cush. 114.

One who purchases or hires property, with notice of an adverse claim of title, though no suit has been brought, takes subject to such claim; and where a bailee, with such notice, carries off the property, by the direction of the bailor, he is answerable to the owner in whose favor a suit has since been decided. *McAnelly v. Chapman*, 18 Tex. 198.

If a purchaser of goods in satisfaction of a debt be informed by any means sufficient to put him on inquiry, and this without demand, that his debtor hold the goods only as factor, his subsequent taking them away is a conversion. *Scriber v. Masten*, 11 Cal. 303.

But no action lies against one, who, knowing that property is under an attachment, suffers it to be sent away and sold by the owner, and receives the avails arising from the sale, in pursuance of a previous arrangement. *Polley v. Lennox, &c.* 2 Allen, 182.

would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use."¹ And simple *possession*, with a claim of title adverse to that of the true owner, is held sufficient evidence of *conversion*.² Thus no demand is necessary, in *trover*, where the defendant has employed a slave, for some time previous to the suit, in the ordinary domestic avocations, and, upon the trial, asserts a title in himself.³ So where, in *trover* for a slave, the plaintiff proved that the defendant, a negro dealer, purchased the slave in dispute of the plaintiff's mother, knowing that she had but a life-estate in him, and had possession of the slave a few days afterwards; held error for the Court to instruct the jury, that the plaintiff had not made out a *prima facie* case.⁴ So taking the property of another by assignment, from one who had no authority to dispose of it; as taking an assignment of tobacco in the king's warehouse, by way of pledge from a broker who had purchased there in his own name for his principal; and refusing to deliver it to the principal after notice and demand by him; none other than the person in whose name it is warehoused being able to take it out; is a conversion.⁵ (a)

§ 3 a. More especially a *purchase* of property, from one who has no power to sell, where the purchaser takes a delivery of it, and retains the possession, claiming it under the sale, is a conversion of it.⁶ So where a defendant, after the accrual of the plaintiff's

¹ Per Parke, B., *Simmons v. Lillystone*, 8 Exch. 442.

² *Maxwell v. Harrison*, 8 Geo. 61.

³ *Powell v. Olds*, 9 Ala. 861.

⁴ *Speed v. Heisin*, 4 Mis. 356.

⁵ *M'Combie v. Davies*, 6 E. 538.

⁶ *Hyde v. Noble*, 13 N. H. 494.

(a) The defendant receipted to the plaintiff for three shares of stock "to sell for him on commission," which the defendant exchanged for other property. Held a conversion, without proof of demand. *Haas v. Damon*, 9 Iowa, 589.

A sold an engine-lath to B, taking back a mortgage, which contained a covenant for possession by the mortgagor until breach of condition, and delivered the machine to a carrier, to be taken to the town of B's residence. B on the same day pledged the machine to C, and promised to have it sent to him on its arrival. The next morning C went to the carrier, and directed a teamster to take it home, which he did on the same day. After this order, but before the delivery, A recorded his mortgage. C afterwards sold and delivered the machine to

another person, and, on A's demanding it, answered that he had sold it, and did not know where it was, and refused to assist A in finding it. Held, sufficient evidence of title in A and conversion by C to support *trover*. *Chamberlain v. Clemence*, 8 Gray, 389.

The minor son of an owner of a certificate of stock, with a power of attorney in blank indorsed thereon, tortiously transferred it to the clerk of the defendant, and the defendant afterwards directed its sale, and, deducting a commission for his services, paid over the balance to the clerk. Held, the defendant was liable to the owner of the stock for the conversion, even although he acted in good faith. *Anderson v. Nicholas*, 5 Bosw. 121.

title and right of possession, having the property in his own hands by purchase from one who had no title, sold it to another, who carried it beyond the plaintiff's reach, and received the purchase-money; it was held a sufficient conversion, although the defendant was not aware of the plaintiff's title.¹ So trover lies against a mortgagee, who claims under a pretended sale.² So, without demand, against a purchaser from an administrator who sells under an order not within the jurisdiction of the court.³ So where the defendant, in the absence, and without the consent or knowledge, of the plaintiff, personally took possession of his house, which had been kept by him as a public hotel and boarding-house, and of the barn belonging to it, and of the property in those buildings, of which the plaintiff was the owner, consisting principally of furniture and provisions suitable for such an establishment; set up and carried on therewith the same business, in his own name, and on his own account; employed clerks and agents for that purpose; took down the sign of the plaintiff, and substituted his own; used and consumed a portion of the property; mingled it with similar articles which he procured for the concern; and, in his own name, also sold and disposed of the remainder, and appropriated the avails to his own use and benefit; and treated the property, in all respects, as if it belonged only to himself: it was held, that these acts constituted a conversion.⁴ So goods were consigned to order, and one of the bills of lading was indorsed by the shipper, who was agent of the owner of the vessel and goods, and was forwarded by the plaintiff, the master of the vessel, to the defendant, who, on the arrival of the goods, had no other right to them. After the arrival of the goods, the owner indorsed the duplicate bill of lading to the plaintiff, and mortgaged the goods to him. The defendant entered the goods at the custom-house, as owner, in opposition to the plaintiff's attempt to enter them, and took them from the vessel under a custom-house permit, the plaintiff being on board, and claiming the goods as his own. Held, a conversion.⁵ So one J. advised the plaintiffs, that he had remitted to them \$1969, consigned to L. L. received \$4700, and pledged the bill of lading to the defendant, who received the price of the dollars at the Bank of England,

¹ *Harris v. Saunders*, 2 Strobb. Eq. 370.

² *Clark v. Rideout*, 39 N. H. 238.

³ *Hall v. Chapman*, 35 Ala. 553.

⁴ *Clark v. Whitaker*, 19 Conn. 319.

⁵ *Bray v. Bates*, 9 Met. 237.

where they were deposited for safe custody, on a sale of them to the bank. Held, that the letter was a sufficient appropriation of the dollars to the plaintiffs; that the plaintiffs and defendant were not tenants in common of the dollars; that, although no specific dollars had been severed for the plaintiff, yet, as the defendant had converted all the plaintiff's and all his own, trover would lie for the plaintiff's share; and that, although the dollars remained in the same unaltered custody, yet, the delivery, by the defendant, of the bill of lading, which was the symbol of them, and the receipt of the value, was a conversion.¹

§ 3 b. And a party may be held liable for the conversion of the whole of certain property, of which he has misappropriated only a part. Thus if a person finds a raft of timber on a sand-bar in a navigable river, high and dry, and takes possession of it, and assumes to dispose of it, hires a person to assist him in removing a part, and sells that person his interest in the remainder, reserving to himself the portion removed; it is a conversion of the whole.² So drawing part of the liquor from a vessel, and filling the vessel up with water, was held to be a conversion of all the liquor.³ So the defendant, under pretence that he wanted the plaintiff to do his threshing, induced him to move his threshing-machine into the defendant's barn. He then claimed the wheels upon which it was transported, but which belonged to a wagon that the plaintiff had borrowed for the season, to use with the machine. The jury having found against his right to detain the wheels; held, a conversion of the machine, as well as of the wheels; upon the ground that the detention of the wheels brought upon the plaintiff a charge in respect to the machine; compelling him to leave it at the barn, until he could procure other wheels to take it away.⁴

§ 4. Upon the general principle already explained, that, if one legally in possession of the personal property of another misuse that property, it is a conversion, and the owner may immediately maintain trover;⁵ the question of conversion often arises between *bailor and bailee*. (a) Upon this subject it is held, that, if a chattel

¹ Jackson v. Anderson, 4 Taunt. 24.

⁴ Bowen v. Fenner, 40 Barb. 383.

² Gentry v. Madden, 3 Pike, 127.

⁵ Ripley v. Dolbier, 6 Shep. 382.

³ Richardson v. Atkinson, 1 Strange, 576.

(a) See Boothe v. Estes, 16 Ark. 104. It has been held that trover lies on a count on a bailment, where there is an unlawful detention; even if no bailment is proved. Marriam v. Yeager, 2 B. Mon. 389.

be *gratuitously* left with a person, damages for conversion are not recoverable until demand.¹ But a bailee of goods for hire, by selling them, determines the bailment. And the bailor may maintain trover against the purchaser, though the purchase was *bond fide*.² So a wrongful sale or lease of property by a bailee is a conversion in both the seller and the purchaser (though acting in good faith), for which the bailor may maintain trover against either or both.³ (a) Thus if a mortgagor of personal property, or any one claiming under him, sell the entire property, as owner, in exclusion of the rights of the mortgagee, such sale is a conversion, and the mortgagee may maintain trover.⁴ So where the vendee of personal property, under a conditional sale, sells it without performing the condition, his vendor may maintain trover against the second purchaser, without a demand and refusal.⁵ And a wrongful use of property by a bailee is a conversion. Thus where A hired his slave to B, with a special agreement that he should not be employed "in or about the water;" it was held, that the employment of the slave "in or about the water," was a conversion, and, the slave being subsequently destroyed by inevitable accident, that B would be liable in trover, though no injury occurred at the time of the conversion.⁶ And, in general, where a hired slave is accidentally lost, while engaged in an employment to which the bailee had no right to put him, it amounts to a wrongful conversion by the

¹ Polk v. Allen, 19 Mis. 467.

² Cooper v. Willomatt, 1 Com. B. 672.

³ Buckmaster v. Mower, 21 Verm. 204; Crocker v. Gullifer, 44 Maine, 491.

⁴ White v. Phelps, 12 N. H. 382.

⁵ Whipple v. Gilpatrick, 1 App. 427.

⁶ Horsly v. Branch, 1 Humph. 199; Crocker v. Gullifer, 44 Maine, 491.

(a) In a recent case the distinction is made, that a bailee *at will*, and a bailee in whom a personal confidence is reposed, have no assignable interest; and any sale by them passes no property, but puts an end to the bailment, and the bailor may bring trover or trespass against the purchaser who takes the property. But a hirer of property for a term, or a bailee who has a *lien* upon the property, may have an assignable interest in it, and though his sale of the property absolutely will put an end to the bailment, yet a transfer of his interest merely will convey such interest. Thus if A sell to B on condition that the property remain A's till payment for it; if B, before payment, sell to C, subject to A's claim, C acquires the same rights to the property as were held by B, and on tender of the price the property becomes his. *Bailley v. Colby*, 34 N. H. 29.

"If I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending." Lit. § 71. And Lord Coke adds, "The reason is, that, when the bailee, having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in those cases he may bring an action of trespass on the case for the conversion, at his election." *Clark v. Gilbert*, 2 Scott, 520.

Where the contract of bailment was, that upon a certain contingency the bailee was to account to the bailor for the property; and upon legal demand the bailee refused to deliver the property, disputed the bailor's right to it, and offered in no way to account for it; the bailor may bring trover. *Estes v. Boothe*, 20 Ark. 583.

bailee.¹ So where the defendant borrowed a carriage of the plaintiff to use in a particular place, and sent it heavily loaded to another place, whereby the carriage was damaged; it was held a conversion.² So if an infant take property wrongfully, this is an actionable conversion; and, if it be bailed to him, and he use it for a different purpose from that for which it was bailed, the bailment is determined, and he is liable in trover.³ So where one hires a horse to go an agreed distance, and voluntarily goes beyond that distance, he is liable for a conversion, as well as for any injury to the horse, though occurring without his fault.⁴ Even, it is held, though the horse was let on Sunday, in violation of a statute.⁵ (a) (See Chap. 4.) And it is not necessary that the owner should tender back the money received for the hire of the horse.⁶ So where the plaintiff delivers his horse to another, to be kept until a note given for the price becomes due or is previously paid; and before the time of payment the horse is sold to the defendant by the bailee, without notice of the plaintiff's claim; and the defendant, after notice of such claim, continues to use and claim the horse as his own after the time limited for the payment of the note: this amounts to a conversion, and the plaintiff may maintain trover without a demand.⁷ So if one in possession of property pledges it without authority, it amounts to a conversion, and the pledgee is liable to the owner in trover, whether he was aware of the real state of the title or not.⁸ So if chattels are pledged without authority by a person to whom they have been intrusted by the owner for a special purpose, the pledgee, after notice of the true ownership, and a demand by the owner, which he refuses, is liable to a subsequent purchaser of the owner's rights, in trover, after a demand by such purchaser; although he has sold the chattels since the first demand, and before the second.⁹ So one holding goods, with a lien for charges and expenses, is liable to an action for conversion, after an offer of payment and demand for the goods,

¹ *Spencer v. Pilcher*, 8 Leigh, 565.

² *Hart v. Skinner*, 16 Verm. 138.

³ *Green v. Sperrey*, 16 Verm. 390.

⁴ *Wheelock v. Wheelwright*, 5 Mass. 104;
Fish v. Ferris, 5 Duer, 49; *Disbrow v. Tenbroeck*, 4 E. D. Smith, 397.

⁵ *Woodman v. Hubbard*, 5 Fost. 67.

⁶ *Disbrow v. Tenbroeck*, 4 E. D. Smith, 397.

⁷ *Porter v. Foster*, 7 Shep. 391.

⁸ *Thrall v. Lathrop*, 30 Verm. 307.

⁹ *Carpenter v. Hale*, 8 Gray, 157.

(a) If the owner of the horse receives payment for the whole distance travelled, he thereby ratifies the act of the hirer, so that trover will not lie; but, if the hirer

has injured the horse by ill usage, the remedy is an action on the case. *Rotch v. Haines*, 12 Pick. 136.

unless he state the amount of his claim, and offer to surrender the goods upon payment.¹ (a)

§ 4a. But an unauthorized use of property by the bailee is sometimes held not a conversion, unless injury is caused thereby. Thus, where the defendant had the plaintiff's horse for agistment and feeding, and rode him fifteen miles, and the horse died immediately after, but not in consequence of the riding; this was held not a conversion.² And if A sell to B sheep, that B had before leased to A, and at the time of the sale B knew that they were the same sheep he had leased A, it is not a conversion of the sheep so sold, and B cannot maintain trover against A for the sheep.³

§ 5. The precise time, at which conversion of property in the hands of a bailee may occur, is sometimes brought in question, in connection with *the statute of limitations*. Thus to an action of trover for wine, commenced October, 1833, the statute of limitations was pleaded. The wine, in pipe, had been deposited by C, for the plaintiff, in the defendant's cellar, by her leave. C became a bankrupt, and, his assignees claiming the wine, the plaintiff's solicitors warned the defendant, by letter, in December, 1826, not to give it up to any person unauthorized by them. The defendant kept the wine and bottled part of it, at or soon after the end of 1826, at which time it was becoming injured by remaining in the wood. Afterwards, but it did not appear when, she consumed part of the wine so bottled. In November, 1827, the plaintiff's solicitors again wrote to the defendant, saying that they were instructed to proceed at law against her, and referring to a demand of the wine, stated in the letter to have been made upon her by them in the preceding March, but of which there was no further evidence. They also offered to indemnify her against the claim of any other

¹ Wagenblast v. M'Kean, 2 Grant, 393.

² Downer v. Rowell, 24 Verm. 343.

³ Johnson v. Weedman, 4 Scam. 495.

(a) The point under consideration has often arisen in connection with *slaves*. Where one, having hired a negro to work on his farm, employed him on a steamboat, the negro being drowned, he was held responsible. *Richardson v. Dingle*, 11 Rich. 405; acc. *Fail v. McArthur*, 31 Ala. 26.

The owner of a slave put him on board a steamboat, for transportation for hire. To prevent accident or escape, he tied him to a post on the boat. The master of the boat, for the purpose of getting the service of the slave at the pump, without any necessity of urgent character and without

the owner's consent, untied him, and afterwards let him go about the boat, with his arms tied. In consequence of this the slave was lost. Held, without reference to what the owner would have done if then present, the master of the boat was liable for a conversion of the slave; there being no subsequent waiver or ratification of these acts. *Scruggs v. Davis*, 5 Sneed, 261.

If a tenant of slaves for life sell the absolute estate in them to a slave-trader to the southern market, this is a conversion. *Coffey v. Wilkerson*, 1 Met. (Ky.) 101.

person, if she would deliver the wine within a week; in default of which they stated that the proceedings would be commenced. The application was not noticed. A subsequent demand and refusal were proved. The jury having found for the plaintiff; held, on motion to enter a nonsuit, that on this evidence the jury were not bound to conclude, either that there had been a demand and refusal more than six years before action brought, or that the defendant had bottled the wine with intent to convert it to her own use.¹ (a)

§ 6. Where one induces another to enter into a contract and part with his property, either by duress of imprisonment or duress *per minas*, the transaction is void, and no title passes; (b) and a party who assumes the control of property, obtained by him in this way, is liable to the owner in trover, without any previous demand.² So if one in good faith purchase and subsequently sell stolen goods, he is liable in trover to the owner, without a demand and refusal.³ So *fraud* in obtaining goods is held to dispense with a demand and refusal;⁴ as well in an action against one having notice of, and more especially one participating in, the fraud, as the original purchaser himself.⁵ Thus, if goods are procured by

¹ *Philpott v. Kelley*, 3 Ad. & Ell. 106.

² *Foshay v. Ferguson*, 5 Hill, 154.

³ *Courtis v. Kanes*, 32 Verm. 232.

⁴ *Tallman v. Turck*, 26 Barb. 167.

⁵ *Luckey v. Roberts*, 25 Conn. 486.

(a) See, as to conversion by a bailee, *Harvey v. Epes*, 12 Gratt. 153. One coming into possession of property by agreement, and afterward selling it according to the agreement for the sole use and benefit of the owner, cannot be guilty of conversion of such property. But if the proceeds thereof be in money, and he refuse to pay it over on reasonable demand, or according to the terms of the agreement, he will be liable for so much money had and received; or, if the proceeds are other property, upon a like refusal, he will be held guilty of a conversion of such proceeds, and will be liable in damages. *Chase v. Blaisdell*, 4 Min. 90.

It is not a conversion, but a mere breach of duty, for an agent, intrusted with property to sell at a certain price, to sell it at a less price. *Moore v. McKibbin*, 33 Barb. 246.

For the vendee of a slave, upon the improper refusal of the vendor to receive her back and rescind the contract, to set her to work instead of abandoning her, is no conversion. *Rand v. Oxford*, 34 Ala. 474.

With regard to the principle already referred to (p. 100), that misappropriation of

part of the property will be a conversion of the whole; it was suggested by Paterson and Coleridge, J's, that, if a bailee of wine draws off and converts part of it without the owner's knowledge, and at the end of six years is sued in trover for the whole; he cannot set up his conversion of part as a conversion of the whole, to support a plea of the statute of limitations.

(b) So it is held, in New York, that, where a borrower, on obtaining a loan of money at an illegal rate of interest, assigns to the lender bonds and mortgages, in consideration of such loan, the assignment is void, and trover may be immediately maintained for them by the mortgagor. *Schroepel v. Corning*, 2 Seld. 107.

But the declaration must conform to the statute, (2 R. S. 352, § 3). 2 Comst. 132.

So where the owner of stock pledges it as collateral security for a usurious loan, he may, on a demand of the stock and a refusal to return it, recover its value in an action of trover. And this, although the pledgee by the terms of the contract was authorized to hypothecate it, and had hypothecated it before such demand. *Conslan v. Davis*, 4 Bosw. 619.

fraud under color of a purchase, and are received by a third person with notice of the fraud, or under circumstances sufficient to put him on inquiry; or if he fails to put himself on the footing of a *bond fide* purchaser for a valuable consideration: he is guilty of a conversion, as to the original owner. And this, although he may have received the goods before the owner took any steps, or made known his determination, to reclaim them; and might acquiesce in the fraud, and abandon his right to treat the sale as a nullity and reclaim the goods.¹ So the assignee of an insolvent debtor may maintain trover, without proof of demand and refusal, against a vendee of goods, sold by such debtor before he came under the operation of the insolvent laws; if the sale of the goods was fraudulent, if both the vendee and vendor concurred and united in the fraud, and if the vendee converted the goods to his own use. And demand and refusal constitute one mode, but not the only mode, of proving such conversion.² (a) So if a man, in insolvent circumstances, sells property, and the vendee disposes of the property by sale or otherwise, after his vendor has made application for the benefit of the insolvent law, or, if prior to such application, while the goods remain in the possession of the original vendor, he makes a second sale of them, and, subsequently to the petition, the first vendee adopts or sanctions that sale; such conduct will amount to a conversion, without a demand and refusal.³ And it seems that any act of a creditor, to whom property has been conveyed in fraud of the provisions of the insolvent law, which amounts to the use or enjoyment of the property in exclusion of

¹ Gage v. Epperson, 2 Head, 669.

² Dictus v. Fuss, 8 Md. 148.

³ Salisbury v. Gourgas, 10 Met. 442.

(a) A, fraudulently as against the creditors of his firm and co-partner B, had transferred firm notes to C, in payment of a private debt. The defendant, who was the father of B, and who had advanced the capital for his son, threatened suit against C unless he received satisfaction, and thereupon C gave to him an order on C's agent, for two of the notes. Finding, upon receipt of the notes, that they were indorsed by A, the defendant immediately carried them to C, and demanded other notes in lieu thereof, whereupon C gave his own notes for the like amount. Held, not a conversion, for which the defendant was responsible to a receiver of the property of the firm. *Gellatly v. Lowery*, 6 Bosw. 113.

If goods be obtained from A by fraud, and pawned to B without notice, and

A prosecute the offender to conviction, and get possession of his goods; B may maintain trover for them. *Parker v. Patrick*, 5 T. R. 175.

Where R asked H for a loan of \$50, and gave a watch as security, which H took, and went away, and after about twenty minutes returned, saying that he could not let R have the money, and that he had not got the watch; and, on being asked by R for an explanation, he declined to give any; it seems this is not in itself a tortious conversion. But R might sell the watch, so as to give the purchaser a right to demand it of H, and, on his refusal to give it up without sufficient excuse, to maintain trover for it. *Hall v. Robinson*, 2 Comst. 293.

the rights of the assignees, is a conversion.¹ Though not the mere taking of a bill of sale prior to the vendor's petition under the insolvent law, even if fraudulent as to creditors.² And the question of conversion may also arise in case of *mistake*. Thus, where goods are delivered by a vendor to a carrier, and the carrier, after notice from the vendor to stop them *in transitu*, by mistake delivers them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee.³ So goods were shipped at Sunderland, intended to be sent to the plaintiff's agent in London, but by mistake were conveyed to the defendant, who sold part of them, being at that time ignorant of the plaintiff's being interested in them. The plaintiff, however, afterwards informed him that they were his property, and directed him to detain them till further orders. Held, the defendant was liable for the amount of those sold, as well as those which remained in his hands undisposed of.⁴ So trover will lie for the misdelivery of goods by a warehouseman, although such misdelivery has occurred by mistake only.⁵ But a creditor who receives in pledge from his debtor the goods of another, supposing them to belong to the debtor; and afterwards permits the debtor to sell and deliver them, on the promise of the purchaser to pay the creditor the price thereof, towards the discharge of the debt; does not thereby render himself liable to the owner in trover.⁶ So A and B stored wheat with C, and ordered him to forward and sell. By mistake, he mixed the wheat, sold it together, and sent the drafts for the price to B. Held, he was not liable to A as for a conversion.⁷ And if the plaintiff's sheep become mixed with those of the defendant, and the latter after due diligence cannot separate them; he will not be held liable for them without a demand and refusal. So if he did not know that they were so mixed. Otherwise if, after such notice, he makes no proper attempt to separate and return them.⁸

§ 7. In addition to the case of *bailment*, already considered, conversion may also consist, generally, in a *breach of trust* in relation to the property by the party in possession of it; whether the suit

¹ *Tapley v. Forbes*, 2 Allen, 20.

² *Dietus v. Fuss*, 8 Md. 148.

³ *Litt v. Cowley*, 7 Taunt. 169; *Bartlett v. Hoyt*, 33 N. H. 151.

⁴ *Featherstonehaugh v. Johnston*, 2 Moore, 181.

⁵ *Devereux v. Barclay*, 2 B. & Ald. 702.

⁶ *Leonard v. Tidd*, 3 Met. 6.

⁷ *Pierce v. O'Keefe*, 11 Wis. 180.

⁸ *Cutter v. Fanning*, 2 Clarke (Iowa),

be brought against him, or one claiming under him. Thus, where a guardian without right sold property of a deceased ward, and the administrator of the deceased brought trover against the vendee, after demand and refusal; it was held, that the demand and refusal were evidence of a conversion from the time the vendee acquired possession.¹ So A delivered a horse to B, agreeing with him, that, if B would do a certain piece of work within a limited time, he should have the horse, but that the horse should remain the property of A until the work should be completed. B abandoned the work without completing it, and sold the horse to C, who, upon A's claiming the horse, said that A must look to B. Held, that A's right was not divested by the delivery of the horse to B, and that there was evidence of a conversion of the horse on the part of C.² And an unauthorized sale of goods by an *agent* is a conversion, which renders him liable in trover, without a demand, and forfeits his right to a previous tender of the storage.³ (a) So where an agent to sell a horse exchanges him for another, it is a conversion, and trover will lie without a demand.⁴ So, where an agent deposited in a bank a box of specie, belonging to his principal, on general deposit, and took a certificate of deposit in his own name, and subject to his own order; it was held, that a jury were authorized to infer a conversion.⁵ (b) Upon the same principle, when an administrator sells property of his intestate and buys it himself, it is a conversion as to persons having a title to the property.⁶ Or if a factor pledges the goods of his principal for his own debt.⁷ And where a person who had purchased goods of one who had no right to sell, upon a demand by the owner, said he should not deliver them up at present, having bought them of the vendor, supposing them to be his, and afterwards held the goods for the space of seven days, without offering to return them; held, sufficient evidence of a conversion.⁸

¹ *Dealy v. Lance*, 2 Speers, 487.

² *Houston v. Dyche*, 1 Meigs, 76.

³ *Etter v. Bailey*, 8 Barr, 442; *Lindley v. Downing*, 2 Cart. 418.

⁴ *Ainsworth v. Partillo*, 13 Ala. 460.

⁵ *Ringo v. Field*, 1 Eng. 43.

⁶ *Carraway v. Burbank*, 1 Dev. 306.

⁷ *Kennedy v. Strong*, 14 Johns. 128.

⁸ *Sargant v. Gile*, 8 N. Hamp. 325.

(a) But where the goods are deposited with a person, to be sold at not less than a certain fixed price, and the depositary sells them at less than that sum; the owner of the goods cannot maintain trover against him, but the proper remedy is an action on the case. *Sargeant v. Blant*, 16 Johns. 74.

(b) If an agent, having authority to take a note payable to his principal, in discharge of a debt, take it payable to himself, the principal may waive the wrongful act, and claim to have the note delivered to him, and maintain trover for its conversion. *M'Near v. Atwood*, 5 Shep. 434.

§ 8. But, to maintain trover, the defendant must have *converted the property to his own use*; or have done some other act with a *wrongful intent*, expressed or implied. And, without conversion, neither possession of the property, negligence, nor misfortune will render trover sustainable.¹ Thus mere delay of delivery by a carrier is not a conversion.² (See § 9.) So where the petition stated a case of trover and conversion, and the proof was, that the goods were lost by the negligence of the defendant, it was held that the plaintiff could not recover without amending his petition.³ So it has been held no conversion, where a shipmaster throws goods into the sea, to save the ship from sinking.⁴ Or to do a work of charity, or a kindness to the owner, without any intention of injuring the property, or converting it to the party's own use.⁵ So castrating a scrub male hog, running among one's stock, is not such proof of a change of property, as to be evidence of a conversion or appropriation to the defendant's own use.⁶ And it has been held, that, where a person, lawfully coming into possession of the property of another, has parted with it previous to a demand by the owner; the remedy of the owner against him is not by an action of trover, but by a special action on the case, or in assumpsit.⁷ (See chap. 18, § 14.) So there is no conversion, without a repudiation of the right of the owner, or the exercise of a dominion inconsistent with that right. Thus H., residing in Paris, despatched seven cases of goods by a railway, viâ Dunkirk to London, deliverable to N or order. One of the cases arrived at Dunkirk, damaged. R, the agent of the railway, and of the Dunkirk and London steamboats in connection with it, had the damaged case inspected according to the law of France, and consigned it to the defendant, the broker for the steamboats in London, to hold at the disposal of N, or order. N accepted a bill of lading for the case. On its arrival at London, no one having claimed the case within the time specified in the bill of lading, the defendant paid the duty on it, and removed it into a warehouse of B, and B removed it into another of his warehouses, without the defendant's knowledge. There it was burned by an accidental fire. Held, that, whether the defendant was bound to pay, or justified in paying, the duty, or not, there was no conversion by

¹ Rogers v. Huie, 2 Cal. 571. See Herron v. Hughes, 25 Cal. 561.

² Briggs v. New York, &c. 28 Barb. 515.

³ Duncan v. Fisher, 18 Mis. 403.

⁴ Bird v. Astcock, 2 Bulstr. 280.

⁵ Drake v. Shorter, 4 Esp. 165.

⁶ Byrne v. Stout, 15 Ill. 181.

⁷ Kelsey v. Griswold, 6 Barb. 436.

him.¹ So, although every unlawful taking of the chattels of another, with intent to convert them to the use of any other than the owner, and every unlawful taking which destroys or alters the nature of the chattels, is a conversion; the bare removal of the chattels of another, without any intent to deprive him of their possession, and which does not affect their condition, is not a conversion.² And a mere omission of duty is held not to be a conversion. Thus a negro man, employed upon a railroad, asked the agent to let him put A, another negro, in his place, for the day, but the agent, finding that A was a slave, refused. A, however, at the instance of the other negro, got into a car and went seven miles, and assisted some in the work, before he was observed by the agent, who did not force him off then, but let him remain until they went seven miles more to their place of destination. There the agent told the hands in his employ, addressing them by the appellation of "boys," to get down and stop the cars. A got down among them, but, being inexperienced, blundered and fell, and the wheels of the car, passing over him, gave him a wound of which he soon died. In trover against the railroad company, held, the mere omission to force the slave from the cars, when first discovered, was not of itself a conversion, especially as he could be returned in the cars, with more safety and expedition than he could be got home by being sent afoot; and the acts of the agent were not such as to render either him or the company liable for damages.³

§ 9. And more especially will any slight interference by one person with the property of another not be deemed a conversion, where such interference is connected with the exercise of some right of the former. (a) Thus the plaintiff, a porter on the custom-house quay, put in goods belonging to A, and laid them so that the defendant could not get to his chest without removing them. He did remove them a short distance, and without returning them to their place went away; and the goods were lost. The plaintiff made satisfaction to A for the goods, and brought trover against the defendant. Held, although the plaintiff had sufficient

¹ *Heald v. Carey*, 9 Eng. L. & Eq. 429;
11 Com. B. 977.

² *Sparks v. Purdy*, 11 Mis. 219.

³ *Railroad Co. v. Kidd*, 7 Dana, 245.

(a) The plaintiff purchased five negroes of a tenant for life, intending to run them out of the state, and to defeat the interest of those in remainder. To protect their

interests, the defendant seized the negroes. In an action of trover, it was held that such seizure was not a conversion. *Sharp v. Nesmith*, 6 Rich. 31.

property in the goods to maintain trover, there was no conversion by the defendant.¹ So, where the plaintiff's goods and servants were on land which the defendant recovered in ejectment, and the defendant, on entering under the writ of possession, turned the servants off the land, and would not let them remain for the purpose of removing the goods; there having been no subsequent demand or refusal, held, the jury might find that there was no conversion.² So, in trover for timber, the pleas were, not guilty, and a justification, that the defendant was possessed of a close, and was digging a saw-pit therein, and, because the goods were put and placed on the close by the plaintiff, without leave or license, and were so buried therein, that the defendant could not make the saw-pit without a little cutting and destroying the said goods, the defendant did necessarily a little cut and destroy them. Replication, *de injuriâ*. It appeared, that several spars, used for bowsprits, were placed on the defendant's land by the plaintiff; that the plaintiff covered them over with earth, and then directed a pit to be dug, and, in order to dig the pit, the spars were unavoidably cut asunder. The premises being close to the river Thames, some pieces of the spars were accidentally washed away. Held, that there was no conversion of the timber; that it was a misdirection to leave to the jury the intention of the defendant in making the pit; for, if the timber was wrongfully put on his land, the defendant would be justified in cutting it, if he could not make the pit without doing so, whatever his intention might be; but that the plea was bad, for not stating that the timber was buried by the plaintiff.³ And, upon similar grounds, trover does not lie against a carrier for negligence, as for losing a box; although it lies for an actual wrong, as if he break it to take out goods, or sell it. And refusal to deliver is no evidence of conversion, if the thing has been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he refused to deliver it, this is good evidence of a conversion.⁴ (a)

¹ *Bushel v. Miller*, 1 Strange, 128.

² *Thorogood v. Robinson*, 6 Ad. & Ell. (N. S.) 769.

³ *Simmons v. Lillystone*, 20 Eng. L. & Eq. 445.

⁴ *Anon.* 2 Salk. 656.

(a) See *Carrier*. Also § 8. A slave, bequeathed to one for life, and then over, had been carried off, and not heard from for more than seven years before the death of the tenant for life. Held, in an action of trover for the slave, by the ultimate pro-

prietor, after the death of the tenant for life, that a presumption of the slave's death arose, after seven years' absence without being heard from; and that the plaintiff must fail in his action, because there was no proof of property in himself, nor a com-

§ 10. But, as we have seen (§ 6), the assertion of a claim to personal property, or the wrongful dominion and assumption of property in personal chattels, by one who *threatens* the rightful owner if he attempts to take or remove them; amount in law to a conversion, and are not merely evidence of it. And the party is liable for that which he removed after, as well as before, the institution of the suit.¹ (a) Thus where the defendant came into possession of slaves as a loan, and after the death of the lender, and with knowledge of the plaintiff's title, derived by will from the lender, asserted title to the slaves, and declared that he would hold them in spite of them; it was held that this, coupled with user and acts of control, was a conversion.² So trover lies, where the owner of the land forbids a purchaser at a sheriff's sale to go upon the land to bring away the goods.³ Upon a similar principle, if a party pay money, in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong-doer.⁴

¹ Hare v. Pearson, 4 Ired. 76; Crocket v. Beatty, 8 Humph. 20.

² Adams v. Mizell, 11 Geo. 106.

³ Nichols v. Nenson, 2 Murph. 302.

⁴ Shipwick v. Blanchard, 6 T. R. 298.

version by the defendant. *Lewis v. Mobley*, 4 Dev. & Batt. 323.

Where the defendant took a cow of A, who was not the owner of the cow, but of this the defendant had no knowledge, to keep through the winter, under a contract that he might buy her in the spring, if A did not pay him for her keeping; held, the defendant could not be regarded as a purchaser of the cow, or as claiming a right to her as owner. *Deering v. Austin*, 34 Vt. 330.

A, the owner of a cow, on the 30th of August, 1859, turned her out and delivered her to the plaintiff as security for a debt. The plaintiff kept her until October 30th, 1859, when A, not having paid the debt, wrongfully took the cow, and contracted with the defendant, who had no knowledge that A was not the rightful owner, to keep the cow for him through the ensuing winter for eighteen dollars, with a provision, that, if A did not pay it in the spring, the defendant might purchase the cow and pay A twenty dollars for her. In December, 3, 1859, the plaintiff sold his interest in the cow to B, who called on the defendant April 12, 1860, notified him of his title, and demanded the cow. The defendant refused to give her up. Held, no evidence of a conversion in this suit, although it might have been in a suit in the name of B. *Ib.*

(a) A lessor gave the lessee a written

permit to move certain buildings on the premises, and erect others, with a stipulation, that, at the expiration of the lease, the lessee might take away or sell upon the premises the new buildings, after the restoration of the old ones to their original position. A new building having been erected, and the position of the old ones altered, the lease was surrendered. The lessee sold the new building, and the plaintiff, his vendee, before the expiration of the time for which the lease was given, and without entering on the premises for the purpose of restoration, demanded the new building of the defendant, the grantee of the original lessor, saying that he was the owner of the building, and was ready to comply with all the conditions of the original permit. The defendant replied, that he should hold by force if any attempt was made to remove the building. The plaintiff brings an action of tort for the conversion of the building. Held, no demand was necessary on the part of the lessee, but only a fulfilment of the stipulation in the permit, and, if the lessee was on the premises at the proper time, and attempting to perform the conditions, and was refused that privilege, it might be evidence of conversion; but, the lessee having failed to restore the buildings to their original condition, the demand made from a distance was not such evidence. *Parker v. Goddard*, 39 Maine, 144.

§ 11. The question of conversion may arise, where goods are seized or detained by *process of law*, or by a legal officer. (a) (See chap. 29 *et seq.*) Thus to maintain trover against a sheriff selling under attachment, the owner need not prove a conversion by the sheriff to his own use.¹ So if an officer attach goods on a writ against a third person, and place them under the care of a keeper, who keeps them under his control, and absolutely refuses to deliver them to the owner upon request, without asking time for consultation with the officer; this is sufficient evidence of a conversion. And this, although the goods were consigned to such third person for sale, in boxes marked with his own name, and were in his store with his own goods, all of which were attached at the same time; if, at the time of making the attachment, the officer was informed that some of the goods in the store did not belong to the defendant in the writ.² So a suit lies against an officer, for the conversion of goods attached by him as the property of one who is alleged to have purchased them of the plaintiffs by means of false representations, without proof that the attaching creditor knew of the fraud. And evidence of the good reputation of the purchaser for honesty and moral worth is inadmissible in defence.³ So trover lies against an officer, for goods sold on execution, which are by law exempt from such sale.⁴ Or when property has been taken upon execution, issued on a judgment void for want of jurisdiction in the court rendering it. Or against any one receiving the property from the officer.⁵ (a)

¹ *Nutter v. Ricketts*, 6 Clarke (Iowa), 92.

² *Bowen v. Sandborn*, 1 Allen, 389.

³ *Atwood v. Dearborn*, 1 Allen, 483.

⁴ *Mandlove v. Burton*, 1 Cart. 39.

⁵ *Martin v. England*, 5 Yerg. 313.

(u) A and B, a peace-officer and a private person, without a warrant, arrested a slave who had committed a misdemeanor in another county, and not in their presence, and, instead of carrying the slave before a magistrate for an examination, forcibly took him from the possession of his owner, and committed him to the county jail, from which he escaped and was thereby lost to his owner. Held A and B and C, the jailer, were liable to the owner for his value. *Munford v. Taylor*, 2 Met. (Ky.) 599.

(a) If an officer attaching goods, subject to the lien of a common carrier for freight, pay that freight, that he may get the goods into his possession; in respect

to the lien, he stands in the place, and has the rights, of such carrier. But if, on a demand of the goods, he makes an unqualified refusal, without any claim of lien, he cannot afterwards set up such lien as a defence to an action of trover for the goods. *Thompson v. Rose*, 16 Conn. 71.

The owner of a horse mortgaged it and delivered possession to the mortgagee. Afterwards the mortgagor assigned his remaining interest to C, and became the servant of C, and the mortgagee permitted C to make use of the horse. C and the mortgagor afterwards delivered the horse to S, to be depastured. Afterwards, on July 10th, the mortgagee conveyed his right to the four plaintiffs, and on the same

§ 11 *a*. But trover does not lie merely for a *malicious attachment*.¹ And an officer may defend against a claim for conversion, under a judgment, though wrongful. Thus, if A recover in replevin a parcel of sheep, and B, as the servant, and by the command of A, take them, with the assistance of the sheriff's officer, and put them into his master's grounds; a refusal by B to redeliver to their true owner on demand is not a conversion, although the judgment in replevin be wrongly given.² And the general rule applies to one claiming under legal process, that a mere temporary intermeddling with property, abandoned by the party upon a claim made by the owner, is not a conversion. Thus, where a levy was made, under an attachment, on property in the hands of a mechanic, but the officer did not take actual possession; and the plaintiff in the attachment, as soon as he was informed that there was a claim to it by a third person, gave notice to such person that he relinquished all right to the property: held, no conversion.³ (*a*)

¹ *Rogers v. Pitman*, 2 Jones, 56.

² *Mires v. Solebay*, 2 Mod. 242.

³ *Bailey v. Adams*, 14 Wend. 204.

day C conveyed his right of redemption to three of them. July 13th, the horse was attached, while in the hands of S, in a suit on a note against C and the mortgagor, brought in the name of the payee, but by the direction and for the benefit of the indorser, the defendant in the present action, and was sold on the execution in that suit, and purchased by the present defendant. In a short time after the attachment, S was notified by a letter from C, that the horse was sold to the plaintiffs, and he was requested to deliver it to them, of which he informed the nominal plaintiff in that suit, but no such delivery was made. Held, the defendant was liable in trover for the horse, and that the original taking by the defendant was tortious, and therefore trover might be sustained against him without any previous demand. *Hunt v. Holton*, 13 Pick. 216.

And the same question may arise in connection with an *attachment* of property, and not only between the parties to the suit and the officer, but between the latter and his bailee or receptor. Thus the expression, "we being receptors," in a written admission of a demand and a refusal to deliver goods, for the recovery of which an action of trover on an officer's receipt for property attached had been brought, was held to be evidence only of the fact that a receipt had been given. And it was also

held, that the plaintiff's right to recover must depend upon the tenor of the receipt. *Taylor v. Rhodes*, 26 Verm. 57.

(*a*) An officer is not made liable for the conversion of attached property, by proof that it has been stolen from his possession. *Dorman v. Kane*, 5 Allen, 38.

A cask of gin was attached by the defendant, as an authorized person, upon a writ against the plaintiff, and the suit finally resulted in a nonsuit, whereupon the plaintiff demanded the gin of the defendant, from whose house, however, in his absence, it had been previously taken and sold by another person, who claimed to own it. When sold, it contained seven gallons less of liquor than when attached, which had been taken out by some one, or had evaporated or leaked out. Held, no evidence of conversion. *Nutt v. Wheeler*, 30 Verm. 436.

One, who, knowing that property is under an attachment, suffers it to be sent away and sold by the owner, and receives the avails arising from the sale, in pursuance of a previous arrangement to that effect, is not thereby guilty of a conversion. *Polley v. Lenox*, &c. 2 Allen, 182.

A trip-hammer and other cumbrous articles of machinery were attached by an officer, in the shop where they were used, and bailed to the defendant, with the understanding that such use should continue.

§ 11 *b*. So trover lies against officers of the revenue, for making a wrongful seizure of goods.¹ As for seizing and carrying away goods for non-payment of duty, if they are not liable to pay it.² (a) Or where a toll of corn had been customarily taken, by dipping into the sack so as to bring out a certain quantity, and the collector, the defendant, varied from the proper mode (by sweeping instead of lifting the toll), so as to take more.³ So where a public officer received goods, the detention of which was not justified by an act of parliament, and refused to give them up to the owner without payment of salvage; this was held to be evidence of a conversion.⁴ (b) So trover may be maintained against a *postmaster*, in the courts of New York, for improperly detaining a letter or newspaper addressed to the plaintiff, although such detention is under color of the laws of the United States, and the regulations of the post-office department. But the conversion should be clearly proved, the withholding shown to be without color of right, and the plaintiff should establish his own title by unquestionable evidence.⁵

§ 12. As has been already stated, an unauthorized, wrongful, or illegal taking or appropriation of property constitutes *actual conversion*, for which an action lies, without previous *demand and refusal*.⁶ Thus, where there is evidence of a conversion by selling the property, proof of a demand and refusal is unnecessary; although in the first instance the property came lawfully to the defendant.⁷ And in trover for property obtained by the defend-

¹ Tinkler v. Poole, 3 Wils. 147.

² Chapman v. Lamb, 2 Strange, 943. *Contra*, Etriche v. Officer, &c. Bunb. 67.

³ Norman v. Bell, 2 B. & Ad. 190.

⁴ Clark v. Chamberlain, 2 Gale, 127.

⁵ Moses v. Walker, 2 Hilt. 536; Paige v. O'Neal, 12 Cal. 483; Teall v. Felton, 3

Barb. 512; 1 Comst. 537; 12 How. U. S. 284.

⁶ Carr v. Gale, Daveis, 328; Gentry v. Madden, 3 Pike, 127. See Conner v. Allen, 33 Ala. 515.

⁷ Kyle v. Gray, 11 Ala. 233; Davidson v. Donadi, 2 E. D. Smith, 121.

The officer, in the street, and near the shop, demanded the articles of the defendant, who thereupon offered to go at once to the shop and deliver them; but the plaintiff neither went with the defendant nor designated any other place of delivery. Held, the shop was the proper place of delivery, and there was no proof of a conversion. Durgin v. Gage, 40 N. H. 302.

An officer, who, under a writ of replevin takes the property described in it, is not liable in trover. Weinberg v. Conover, 4 Wis. 803.

(a) In trover, the defendant cannot justify detaining goods, till custom-house du-

ties paid on them without authority are refunded. But the amount so paid may be deducted in damages. Stone v. Lingwood, 1 Strange, 651.

(b) But a public officer will not be held guilty of a conversion, unless he has wrongfully asserted a claim or title to the property in question. Thus a surveyor of highways lawfully removed wood which was placed within the limits of the highway, and gave notice to the owner where he had put it, and told him he might have it on paying for the removal. Held, no conversion. Plumer v. Brown, 8 Met. 578.

ants by an act of trespass, a demand is not necessary.¹ So where the defendant came into possession of goods wrongfully, no tender is necessary of the amount of freight, &c., paid by him, to enable the plaintiff to maintain trover.² So the plaintiff pawned a watch, and afterwards gave the defendant the duplicate to get it out of pledge. The defendant took it out accordingly, on paying the advance and interest. The plaintiff's agent claimed the watch from the defendant, saying, the plaintiff would of course pay what had been advanced to redeem it. The defendant said he had not got the watch, and would not tell who had. Held, evidence of a conversion to sustain a verdict for the plaintiff in trover, and that the plaintiff was not bound to tender the defendant the sum paid on account of the watch, as the defendant did not have it ready to deliver to him in return.³

§ 12 a. But it now remains to be more distinctly explained, that demand and refusal will furnish a ground of action, although the property was at first rightfully acquired.⁴ Upon this point it has been sometimes held, that, where there is proof of a positive and unexcused refusal to deliver, on demand made, the Judge may advise the jury, *as a matter of law*, to find a conversion;⁵ that such demand and refusal are not merely evidence of conversion, but *per se* constitute such conversion.⁶ It is, however, the prevailing doctrine, that refusal upon demand is not an actual conversion, but evidence of it;⁷ (a) which, however, is conclusive,

¹ Matheny v. Johnson, 9 Mis. 232.

² Lempriere v. Pasley, 2 T. R. 485.

³ Jones v. Cliffe, 3 Tyr. 576.

⁴ See Blakely v. Ruddell, 1 Hemp. 18; Whitney v. Slanson, 30 Barb. 276; Kolsom v. Manchester, 11 Cush. 334; Dietus v. Fuss, 8 Md. 148.

⁵ Mitchell v. Williams, 4 Hill, 13.

⁶ Baldwin v. Cole, 6 Mod. 212.

⁷ Munger v. Hess, 28 Barb. 75; Morris v. Pugh, 3 Burr. 1241; Boyle v. Roche, 2 E. D. Smith, 335.

(a) Upon this principle, a demand and refusal may be evidence of a *prior* conversion. Thus, where deeds were in the defendant's possession prior to Michaelmas term, and the demand and refusal proved were on the day after that term, it was held that this was evidence of a conversion before the term. *Wilson v. Girdleston*, 5 B. & Ald. 847.

But, in case of wrongful sale, the conversion of property relates to the time of the sale by which the defendant claims it. *Head v. Goodwin*, 37 Maine, 181.

And a plaintiff, who had no title to the goods at the commencement of the action, cannot maintain trover for their conversion. *Clapp v. Glidden*, 39 Maine, 448.

Conversion so far consists in, instead of

being merely *proved by*, demand and refusal, that if, in trover, there has been a demand and refusal within six years before the bringing of the suit, and there is no other evidence of conversion; the statute of limitations will not bar the action. *Collis v. Bowen*, 8 Blackf. 262.

Thus an executor left household stuff in the house, by consent of the heir, who used them afterwards. Within six years of the action brought, the executor demanded the goods, and the heir refused to deliver them; whereupon trover was brought, and the Statute of Limitations pleaded. Held, that, the demand and refusal being within six years, the action was not barred. *Montague v. Ld. Sandwich*, 7 Mod. 99.

If there has been a tortious use or taking,

if not rebutted or explained.¹ A demand and refusal, made when the defendant had power to deliver the goods, is held equivalent to a conversion, unless explained by sufficient evidence.² So a slight agency on the part of the defendant, in resisting the claim of the owner, is sufficient to sustain a recovery.³ And it has been held that a demand by the attorney of the plaintiff, by a letter actually received by the defendant before the action is brought, is a sufficient demand.⁴ So where an owner of materials puts them into the hands of a bailee, to have work done on them, and then returned, and they come to the possession of the defendant, and the bailee, without special authority from the owner, demands them in order to return them to him, and the defendant refuses to deliver them; this is evidence of a conversion.⁵ So in case of sale with the right to return, refusal upon demand will sustain an action for conversion.⁶ So trover lies for money received by the defendant from a third person, and not paid over on request.⁷ So the plaintiff left property, which he had purchased at an execution sale, with the defendant, for the purpose of allowing the judgment debtor to redeem it; but, if he did not choose to do so, the defendant was to deliver the property to the plaintiff when demanded, or account for it. When called upon, the debtor not having redeemed, he refused to do either. Held, that trover would lie.⁸

§ 12 b. But the law is sometimes strict as to the precise form of demand. Thus a demand in these words, "I shall have to take them from you, if I cannot get my money any other way," is not sufficient, the original taking having been lawful.⁹ So a demand must apply to the specific property, for the conversion of which the action is afterwards brought. Thus the plaintiff, being entitled to the five best beasts as heriots, marked seven beasts, claiming all as heriots, and left them in the possession of the defendant,

¹ *Magee v. Scott*, 9 Cush. 148.

² *Dictus v. Fuss*, 8 Md. 148.

³ *Farrar v. Chauffetete*, 5 Denio, 527.

⁴ *Lovejoy v. Jones*, 10 Fost. 164.

⁵ 3 Fost. 444.

⁶ *Miller v. Grove*, 18 Md. 242.

⁷ *Donohue v. Henry*, 4 E. D. Smith, 162.

⁸ *Boothe v. Estes*, 16 Ark. 104.

⁹ *Monnot v. Ibert*, 33 Barb. 24.

a subsequent demand will not operate as a waiver of the conversion, nor entitle the defendant to prove an offer to return upon such demand. *Manwell v. Briggs*, 17 Verm. 176.

A suit is sometimes considered as in the

nature of a demand. But where goods were pawned to secure a debt, it was held, in an action of trover, that a prior suit, brought for the same goods, was no evidence of conversion. *Prentiss v. Hannay*, 4 Whart. 508.

who was the owner up to the marking. The plaintiff afterwards applied to the defendant, who still had possession of the seven, for the beasts, generally, but the defendant refused to give them up, without qualifying his refusal. Held, no conversion of any of the beasts; the demand having reference to a seizure of seven, and it not being ascertained that any five were legally chosen.¹

§ 13. Upon the principle that demand and refusal are only *evidence of conversion*, the effect thereof may be repelled, by proof that compliance with the demand was impossible.² To maintain trover, the property must be in some way subject to the control of the defendant.³ He must have actual or virtual possession;⁴ which, however, is sometimes presumed, and is a question for the jury;⁵ an interest in or control over the property; more especially if he refuses on the ground that he is not in possession.⁶ Therefore, where a special verdict stated a demand and a refusal, but did not show that the property was in the possession of the defendants at the time of such refusal, there being also other evidence, tending to show that the property was not then in their possession; held, not sufficient to entitle the plaintiff to a judgment.⁷ So the defendant, the widow and administratrix of an insolvent, being applied to by his assignees for some papers which had been in his possession at the time of his decease, answered that they were in the hands of her attorney. Held, not sufficient evidence of conversion.⁸ So where the defendant never had any possession of, or control over, promissory notes, claimed by the plaintiff, except as the agent of his wife, who was entitled to hold them; held, his refusal to deliver them, on demand, could not constitute, or be evidence of, a conversion. Also, that the omission or neglect of the defendant, to perform a promise made to the plaintiff, to procure promissory notes from those who rightfully held them, and deliver them to the plaintiff, did not constitute a conversion, where the defendant never had the notes in his possession or control, and was unable in his individual capacity to obtain possession and control thereof.⁹ So where A mortgages

¹ *Abington v. Lipscomb*, 1 Ad. & Ell. N. S. 776.

² 1 Comst. 522; *Bowman v. Eaton*, 24 Barb. 528; *Dietus v. Fuss*, 8 Md. 148.

³ *Yale v. Saunders*, 16 Verm. 243.

⁴ *Traylor v. Horrall*, 4 Blackf. 317; *Bowman v. Eaton*, 24 Barb. 528.

⁵ *Folsom v. Manchester*, 11 Cush. 354; *Latimer v. Wheeler*, 30 Barb. 485.

⁶ *Morris v. Thomson*, 1 Rich. 65.

⁷ *Hill v. Covell*, 1 Comst. 522.

⁸ *Canot v. Hughes*, 2 Bing. N. C. 448.

⁹ *Hunt v. Kane*, 40 Barb. 638.

B's personal property to C, and the mortgage is duly recorded, but C has never had possession of such property, or asserted any right or claim to it, or intermeddled or interfered with it in any way, except to take the mortgage; C will not be liable in trover to B.¹ So where a demand of certain articles, though accompanied by an inventory, was made on the defendant at a distance from the articles, and a copy of the inventory promised; but whether it was furnished or not, did not appear; held, not a sufficient demand.² And, under some circumstances, a mere passive neglect or omission to comply with a demand will not constitute a refusal. Thus the plaintiff hired to B a wagon, which B traded away to C, who drove it to the premises of the defendant, and left it there. The plaintiff called on the defendant for the wagon, and the defendant showed it to him, and said that C had left it there, and that by the trade between B and C he thought the plaintiff had lost his title. The plaintiff made an affidavit, stating the facts, and that the wagon was in C's possession, which he read on the defendant's premises, and demanded the wagon, to which the defendant replied, "C has no possessions here, these are my possessions." Held, no conversion.³ So the demand may be insufficient, in requiring the defendant to restore the property in a form which has become impossible, although in consequence of the defendant's own act. Thus the bailee of a gun overcharged and burst it. The owner required him forthwith to deliver it back in the same good plight in which he received it; but the bailee refused to do the repair, and did not return it. Held, not evidence of conversion.⁴ And a mere refusal by the defendant to deliver to the plaintiff a chattel of his, which is on the defendant's premises, is not evidence of a conversion; though it is otherwise with a denial by the defendant of the plaintiff's right to it, or a refusal by which the defendant exercises a dominion over the chattel.⁵ So where a chattel was sold and a bill of sale given, and the seller agreed to send the chattel to the buyer by boat, and he delivered it at the wharf, but never sent it; whereupon the buyer demanded a delivery, which was refused, but he knew where the article was and might have taken it: held, no conversion, and that the remedy of the buyer was on the contract.⁶ So a trip-hammer and other

¹ *Burnside v. Twitchell*, 43 N. H. 390.

² *Breese v. Bange*, 2 E. D. Smith, 474.

³ *Ragsdale v. Williams*, 8 Ired. 498.

⁴ *Rushworth v. Taylor*, 3 Ad. & Ell.

N. S. 699; 3 Gale & Dav. 3.

⁵ *Wilde v. Waters*, 32 Eng. L. & Eq. 422.

⁶ *Roll v. Black*, Dudley, 18.

cumbrous articles of machinery were attached, in the shop where they were used, and bailed to the defendant, with the understanding that such use should continue. In trover for the property, it appeared that the officer, in the street, and near the shop, demanded the articles of the defendant, who thereupon offered to go at once to the shop and deliver them; but the plaintiff neither went with the defendant nor designated any other place of delivery. Held, the shop was the proper place of delivery, and there was no proof of conversion.¹

§ 13 *a*. So, although one in possession of the property of another must surrender it on the demand of the owner; if he does not know the applicant to be the owner, he has a right to reasonable proof of that fact.² And one who receives goods knowing that they are not lawfully in the possession of the person who brought them to him, and afterwards allows them to be taken away by the same person, is not thereby guilty of a conversion.³ So a wife applied to the defendant, an attorney, to bring a bill for divorce and alimony against her husband; and brought notes of her husband to him, that he might take a memorandum of the amounts to insert in the bill. He took the memorandum, and returned the notes to the wife, told her to replace them where she found them among her husband's papers, and saw no more of them. Held, no conversion.⁴ On the other hand, even though he received the property from the plaintiff, the defendant may sometimes show in defence the title of a third person. Thus a warehouseman, receiving goods from a consignee, who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them, if they are the property of another.⁵ So where a carrier is summoned as garnishee, and remains in possession of the goods, which have been attached as the property of a third person; his refusal to deliver them to the owner will not be a conversion.⁶ And although, in general, in trover, a defendant cannot give in evidence his answer to a demand; yet, where a demand is made by an agent, and the defendant insists upon the production of his authority, and declines a delivery until then, there is no conversion; and his excuse may be given in evidence.⁷ So where goods,

¹ *Durgin v. Gage*, 40 N. H. 302.

² *Dowd v. Wadsworth*, 2 Dev. 130.

³ *Loring v. Mulcahy*, 3 Allen, 575.

⁴ *Jordan v. Greer*, 5 Sneed, 165.

⁵ *Ogle v. Atkinson*, 5 Taunt. 759. See *Hanna v. Flint*, 14 Cal. 73.

⁶ *Stiles v. Davis*, 1 Black. 101.

⁷ *St. John v. O'Connell*, 7 Port. 466.

the property of the plaintiff, had been, by the servant of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them, refused to do so without an order from the company; held, not a conversion.¹ So A, being insolvent, made a voluntary assignment of all his property to B, the plaintiff, for the benefit of his creditors. B brought this action against the defendant's consignees, claiming for advances and commissions, to recover damages for converting to their own use the property of A. Held, that no demand, unless made in B's name and by his authority, and accompanied by notice and evidence of such authority, would enable B to maintain his suit in this form.² So A lent property to B; and, while it was in B's possession, sold it to C. C sold to D. D brought an action against B for unlawful detention of the property from him. Held, that the action could not be maintained, without proof of demand by D, or a person authorized to make demand for him, and notice to B of D's acquisition of title.³ So F, who had hired a ship and its tackle of the plaintiff for three voyages, at the end of the first, apprehending a seizure under the process of an admiralty court, placed the cables and anchors on the defendant's wharf, alongside of which the ship lay. The ship was then seized for seamen's wages and a debt on bottomry, and shortly afterwards was sold under admiralty process, without the anchors and cables. Two days before the sale, the plaintiff demanded of the defendant the anchors and cables on his wharf, which the defendant, holding them from F, refused to give up. Held, that on this demand, previous to the sale, the plaintiff could not sue the defendant for the anchors and cables in trover, although they had not been removed out of the ship.⁴

§ 13 *b*. But, on the other hand, a party cannot discharge himself of his liability for conversion, by assuming a gratuitous and unauthorized liability to a third person. Thus the vendor of tin shipped it on board a vessel bound to Leghorn, by the orders of the vendee. The captain, by his bill of lading, undertook to deliver the tin to an individual at Leghorn. The tin, being heavy, was placed at the bottom of the hold, with other goods over it.

¹ *Alexander v. Southey*, 5 B. & Ald. 247.

² *Griffin v. Alsop*, 4 Cal. 406.

³ *Wilson v. Cook*, 3 E. D. Smith, 252.

⁴ *Ferguson v. Christal*, 5 Bing. 305.

The vendee having become bankrupt, the vendor required the captain to deliver up the tin, but did not tender the freight, or offer to make any compensation to him for the trouble of unloading the vessel. The latter refused, alleging that he had signed a bill of lading to deliver the tin to another person. Held, that this was sufficient evidence of a conversion.¹ And a party holding property, and refusing to deliver it on demand made, because he doubts the authority of the person making such demand, must place his refusal distinctly upon that ground; otherwise the refusal affords presumptive evidence of a conversion.² Thus, where one receives a chattel, under a stipulation in writing that he will return it "whenever called for, in good repair, and free from expense;" he must deliver it on demand, or excuse the non-delivery. If, when demand is made by a third person, in whose hands the writing was placed for that purpose, the bailee does not call on him to produce his authority, but places his refusal upon the ground that the chattel had been removed from his possession by some other person; he cannot object in his defence to an action of trover, that the agent did not show an authority when the chattel was demanded.³ So, where the plaintiffs sold goods to A, who paid for them and was to take them away, but, the defendant becoming possessed of the place in which the goods were deposited, the plaintiff's attorney, accompanied by A, demanded them of the defendant, telling him that they belonged to the plaintiffs, and that they had sold them to A, to which the defendant answered, that he would not deliver them to any person whatsoever; and afterwards the plaintiffs repaid the money to A: held, that this demand and refusal were sufficient evidence of a conversion, without a new demand by the plaintiffs, after they had repaid the money to A.⁴

§ 13 c. But a qualified refusal is not, *per se*, a conversion, but the question should be left to the jury. And a subsequent tender to the attorney of the plaintiffs, before suit brought, is, it seems, a bar to an action.⁵ So if delay is asked for the purpose of obtaining legal counsel, a reasonable time will be allowed for this purpose, before conversion. Thus in trover against an executor, it appeared that the watch, which was the subject-matter of the action, had been

¹ Thompson v. Trail, 6 B. & C. 36.

⁴ Pattison v. Robinson, 5 M. & S. 105.

² Ingalls v. Bulkley, 15 Ill. 224.

⁵ Thomson v. Sixpenny, &c. 5 Bosw.

³ Spence v. Mitchell, 9 Ala. 744; 27 293.
Miss. 362.

given by the testatrix to one S in September, 1837; that S redelivered it to the testatrix in March, 1838, for the purpose of its being pawned by her; that, on its being demanded by the plaintiff, in December, 1838, the testatrix said that she would consult her solicitor; and that the testatrix died in March, 1839. Held, sufficient evidence of a conversion within six months before the death.¹ Where the defendants have goods in their hands, with a lien for a general balance, it requires a tender and demand on the part of the plaintiff, as well as a refusal on the part of the defendants, to constitute a conversion. But where the only lien is for freight and expenses, an offer to pay these, and a demand and refusal of the goods, are sufficient.²

§ 13 *d.* The plaintiffs, being the owners of the defendant's promissory note for \$2000, pledged it to a third party, as collateral security for their note for \$1000 discounted by him. At the maturity of the defendant's note for \$2000, the plaintiffs being insolvent, he paid to the holder the amount for which his note was held as collateral security, and received the same, together with the plaintiffs' note for \$1000. Held, in an action of trover for the \$2000 note, the defendant was not entitled to retain it until he was repaid the \$1000 advanced by him; and the measure of damages (the plaintiffs being an insurance company) was what they would have been entitled to recover in an action on the note itself, deducting the amount paid by the defendant.³

§ 13 *e.* In trover against A and B for a lease, a demand having been made upon A, he declined to give up the lease until certain rent due to B was paid; but he added, that it was more B's business than his own, and, as he was not in, he (A) would either send the lease in the course of the day, or would write the plaintiff a letter declining to return it. The plaintiff, receiving neither lease nor letter, issued his writ on the following morning. Held, an absolute refusal, notwithstanding the defendants had at the time (though it was not mentioned) a lien upon the lease, for a small sum due to them for business done by them as attorneys for the plaintiff.⁴

§ 14. The conversion of goods, consisting in refusal to deliver them upon demand, may be denied or justified upon the ground of *legal authority*. Thus the seizure of goods fraudulently pur-

¹ *Richmond v. Nicholson*, 8 Scott, 134.

² *Craig v. McHenry*, 35 Penn. 120.

³ *Wagenblast v. M'Kean*, 2 Grant, 393.

⁴ *Weeks v. Goode*, 6 C. B. (N. S.) 367.

chased, on regular process in favor of a creditor of the vendee, is not a tortious act, and a demand by the vendor, accompanied by a statement of his title, is necessary to sustain trover against the officer. But if, upon such demand, there is an unqualified refusal by the officer to deliver the goods, without requiring any evidence of the vendor's title, or expressing any doubts concerning it; the jury may presume a waiver of any information on that subject.¹ So proof of an attachment of goods upon a writ against one in possession of them, without title, will sustain an action for conversion against the officer.² So an attachment of mortgaged property, followed by a refusal to give it up, on demand, and exhibition of the mortgage and mortgage debt, is competent and sufficient evidence of conversion, whether at the time of the demand the property be actually in the possession of the officer or not.³ So trover lies for a horse, seized under pretence of necessity for the public service, and withheld after demand, made subsequent to the termination of such exigence.⁴

§ 14 *a*. But demand and refusal are not conclusive proof of a conversion, when goods are attached in the hands of the defendant.⁵ So in trover for a chaise, it appeared that a third person had hired it from the plaintiff, and afterwards left it for sale at the defendant's repository for carriages in London. While there, it was attached by process out of a city court against a third party; after which, the plaintiff demanded it from the defendant, who refused to deliver it, on the ground, that, under the circumstances, he should be liable for its value if he gave it up. Held, there was no evidence of a conversion, the chaise being at the time of demand in the custody of the law.⁶

§ 14 *b*. And there are other cases, in which a refusal to deliver property on demand may be justified, upon the ground of legal authority. Thus A sued B in trespass for taking a filly. B justified, that the filly belonged to the plaintiff, and was taken by the plaintiff's command. Verdict for A, with damages, subject to an award by the defendant, one of the jurors, to whom the filly was delivered, with the consent of A and the plaintiff, in order that the defendant might determine in a given time, whether the filly was marked with a certain scar; in case

¹ *Thompson v. Rowe*, 16 Conn. 71.

² *Marble v. Keyes*, 9 Gray, 219.

³ *Ferguson v. Clifford*, 37 N. H. 86.

⁴ *Fryer v. M'Rae*, 8 Port. 187.

⁵ *Garvin v. Luttrell*, 10 Humph. 16.

⁶ *Verral v. Robinson*, 5 Tyr. 1069; 1 Gale, 244.

the scar should appear, the verdict for A to stand. The defendant, by his award in due time, stated that the scar had appeared, and ordered the verdict to stand. Ten days after, the plaintiff, without authority from B, demanded the filly of A, who refused to deliver it; and a month afterwards the plaintiff sued the defendant in trover for the filly. Held, that this detention of the filly by the defendant did not amount to a conversion.¹ So a vessel and her cargo were seized and libelled by a collector for breach of the revenue laws. Upon petition, a *remitter* was granted by the Secretary of the Treasury, and an order for the restoration of the property issued from the District Court. But the Secretary, upon further consideration, being satisfied that the claimant was not entitled to relief, wrote to the District Attorney to return the certificate of *remitter*, that it might be revoked; of which orders the collector was notified, and for which cause, upon demand by the deputy marshal, under the order for restoration, the collector refused to deliver the property. Afterwards the *remitter* was revoked, and the owner obtained possession of the property, under an order of the court, by giving a bond therefor, and brought trover against the collector. Held, the property, in the hands of the collector, was in the custody of the law, and his refusal to deliver it was not a conversion; and that the plaintiff, having admitted, by his petition to the court, and by the giving of the bond, that it was so in the custody of the law, was estopped from charging the collector as a wrong-doer. Also, that, if a portion of the property were abstracted, the plaintiff could not maintain trover against the collector therefor; and it seems, that his remedy should be sought in the court which ordered the restoration.²

§ 15. *Conversion*, as has been already explained, is an injury particularly confined to personal property. But the question has sometimes occurred, whether movable articles *connected with the realty* can be sued for in *trover*.³ (See chap. 17.) Upon this point it is held, that the *cutting of timber*, without carrying it away, is a conversion;⁴ and that trover is the proper remedy against a trespasser for cutting timber, as soon as the timber is cut.⁵ (a)

¹ *Gunton v. Nurse*, 2 Brod. & Bing. 447.

⁴ *Sanderson v. Haverstick*, 8 Barr, 294.

² *Barnes v. Taylor*, 29 Maine, 514.

⁵ *Sampson v. Hammond*, 4 Cal. 184.

³ See *Whidden v. Seelye*, 40 Maine, 247.

(a) Turpentine run into boxes (cut into the trees) is personal property, and one who is possessed of the land, though he has no title to it, is the true owner of turpentine

So where wood has been converted, and made into coal, by the defendant, the owner may maintain trover for the coal.¹ So trover may be maintained by the owner of land, for the recovery of crops raised thereon, without license or authority.² So trover lies for cutting and carrying away corn standing and growing.³ Or for a building, standing, as personal property, upon another's land, which he refuses to deliver.⁴ (a) Or against the *bona fide* purchaser of loads of earth taken from the plaintiff's land;⁵ or for sand, gravel and ore.⁶

§ 16. Another questionable subject of the injury of conversion consists of *choses in action*. (See vol. i. 53.) In general, it is held that no person can maintain trover for a chose in action, but the legal owner.⁷

¹ Riddle v. Driver, 12 Ala. 590.

² Simpkins v. Rogers, 15 Ill. 397.

³ Nelson v. Burt, 15 Mass. 204.

⁴ Pullen v. Bell, 40 Maine, 314; Dame v. Dame, 38 N. H. 429.

⁵ Riley v. Boston, &c., 11 Cush. 11.

⁶ Northam v. Bowden, 32 Eng. L. & Eq. 559.

⁷ Webster v. Heylman, 11 Mis. 428.

so produced by his labor and cultivation, and can maintain trover for taking it. Branch v. Morrison, 5 Jones, 16.

Certain lands, together with the woods, &c., were conveyed under a marriage settlement to the plaintiffs, their heirs and assigns, during the life of A, in trust, to pay the rents and profits as she should appoint during her life; and after her decease, to the use of such child or children of the marriage, and in such shares as she should appoint, and for want of appointment, to the use of the children equally, &c., and the heirs of their bodies, with cross-remainders; and, in default of such issue, to the use of the right heirs of A forever. Held, that the plaintiffs could not maintain trover against the defendant, a stranger, for certain trees, which had been cut down by order of the husband of A, and carried away by the defendant. Blaker v. Anscombe, 1 New Rep. 25.

The purchaser of land on an execution, after receiving the sheriff's deed, may bring trover for the timber which had been cut by the defendant, while he remained in possession after the sale. Rich. v. Baker, 3 Denio, 79.

It has been seen (chap. 17) that similar questions may arise in relation to *fixtures*. Trover will not lie against the owner of real estate in possession, for fixtures annexed to the freehold. Overton v. Williston, 31 Penn. 155.

In a late case, a ladder, a crane, and a bench were left by an outgoing tenant upon the demised premises at the expiration of

his term; the ladder and crane being fastened with nails or screws to the floor and to the joists above, in the usual way, and the bench fixed to the wall. Held, in the absence of anything to show that they were put up for purposes of ornament or trade, trover would not lie for them. Wilde v. Waters, 16 Com. B. 637.

The principle, that an owner can follow his property so long as he can establish its identity, does not protect him, where its nature has been changed by being annexed to the freehold, and becoming part of the realty. Jackson v. Walton, 2 Wms. 43.

Where A gives a license to B to get timber on his land, to be hauled to a certain place and there inspected, but not removed till paid for; trover lies against one who removes and appropriates, against A's will, timber thus deposited. Creach v. McRae, 5 Jones, 122.

In trover for wood, the plaintiff may dispute the title of those, under whom the defendant claims the land from which the wood was cut. Parks v. Loomis, 6 Gray, 467.

(a) The plaintiff erected buildings upon a farm which he had contracted to purchase. After he had occupied it thirteen years, A, the owner, sold and conveyed to the defendant, verbally agreeing, as was alleged, that the buildings were personal property. The defendant sold and conveyed the farm to B. Held, though such agreement were made, the buildings passed to the defendant as part of the farm, and trover could not be maintained for them. Fenlason v. Rackliff, 50 Maine, 369.

§ 17. Trover lies for a *bond*, and for *letters-patent*.¹ In reference to *judgments*, it is held that trover cannot be maintained for a judgment, nor a note, which is the subject of a judgment.² And, though judgments rendered by justices are not records, they are muniments of the rights of both parties, by judicial determination. And the party, in whose favor such judgment is rendered, cannot maintain trover for it.³ But the rule, that trover will not lie for a record, applies to the record, strictly so called, which is made and preserved by public authority, and not to such papers as have relation to the record, but are not parcel of it. Therefore a judgment-creditor may sustain trover for a writ of execution, which he has sued out upon his judgment, although the execution may have expired previously to the commencement of the action; since its absence from the office whence it issued might embarrass the plaintiff in procuring a fresh execution upon the judgment, and might even create a presumption that the judgment had been satisfied.⁴ So a debtor, who has made copies of his creditor's account against him, may, if the creditor obtain possession of such copies, and refuse to redeliver them to the debtor, sustain trover therefor against the creditor.⁵ And a refusal to redeliver to the owner a written account, which he has presented for payment, is a conversion; even though nothing was due. And the measure of damages is the apparent amount due.⁶ (α)

§ 18. In reference to notes and other negotiable securities, trover will lie for a promissory note in the hands of a third person.⁷ So it is held that trover may be maintained for a note which has been paid, and left by mistake or otherwise in the hands of the holder,

¹ *Pickering v. Appleby*, 1 Com. 355. As to trover for *money*, see *Stott v. Alexander*, 2 Sneed, 650.

² *Platt v. Potts*, 11 Ired. 266. But see *Hudspeth v. Wilson*, 2 Dev. 372.

³ *Cobb v. Cornegay*, 6 Ired. 358.

⁴ *Keeler v. Fassett*, 21 Verm. 539.

⁵ *Fullam v. Cummings*, 16 Verm. 697.

⁶ *O'Donoghue v. Corby*, 32 Mis. 394.

⁷ *Todd v. Crookshaks*, 3 Johns. 432. See *Brown v. Dunham*, 11 Gray, 42.

(α) See *Symonds v. Atkinson*, 37 Eng. L. & Eq. 585; *Perley v. Dole*, 40 Maine, 139. Under some circumstances, although an action may be maintained for conversion of a *chase in action*, only nominal damages will be recovered. Thus A effected an insurance on the life of B, and, after an act of bankruptcy, assigned the policy to the defendant, who was aware of A's circumstances at the time. On the death of B, it was discovered that his life was not insurable. On a memorial presented by A. to the company, they ordered half the sum,

for which B's life was insured, to be paid as a gratuity, which the defendant received, and the policy was then cancelled, and remained in the hands of their officer. In an action of trover, brought by the assignee of A against the defendant, to recover the value of the policy; held, that he was only entitled to the parchment on which the policy was written, and not to the sum paid by the company to the defendant, as it was a mere gratuitous and voluntary payment. *Wills v. Wells*, 2 Moore, 247.

or disposed of by him, unless the fact of payment is denied by the holder.¹ And where the defendant had left the note with an attorney, a demand of an order on the attorney for the note, and the refusal of the defendant to give such order, contrary to his duty, is sufficient evidence of a conversion.² (b) So where a written agreement, dated 2d September, 1808, between A and B, stated, that A thereby delivered to B a certain promissory note of C, for two hundred bushels of wheat, valued at \$200, payable in February, 1811, and engaged, in case the wheat did not sell for \$200, to make up the deficiency; and B thereby gave to A the power of redeeming the note, by paying \$186 with 3½ per cent. interest, any time within six months of the time the note was payable: it was held, that the note was deposited as a pledge, and not as a mortgage, and that a tender by A of the \$200, on or before the day the note fell due, was sufficient to entitle him to a return of the note; and on such tender, and a refusal by B, A might maintain trover for the note.³ So trover lies by the maker of a note for a fraudulent use of it.⁴ So the collection of a note, by a person not entitled to it, is evidence of a conversion.⁵ And in such case trover lies against the promisor to whom the note has been given up. Thus the holder of a note, being about to leave his home, left the note in the care of his son, whom, with notice to the maker, he directed not to receive payment in his absence. But, the promisor coming, and insisting upon paying the sum due, the son received it, and delivered him the note, which was not then payable. Held, the owner might maintain trover for the note against the promisor.⁶ So bills, indorsed to an agent of the plaintiffs or order for their account, and deposited with the defendants by such agent as a security for future advances, may be recovered by the plaintiffs in an action of trover.⁷ So trover lies for notes, deposited as security for the extinguishment of certain mortgages, upon land formerly belonging to the plaintiff, conveyed by him to

¹ *Pierce v. Gilson*, 9 Verm. 216. *Contra*, *Todd v. Crookshanks*, 3 Johns. 432.

² *Bissel v. Drake*, 19 Johns. 66.

³ *McLean v. Walker*, 10 Johns. 471.

⁴ *Decker v. Mathews*, 2 Kern. 313.

⁵ *Donnell v. Thompson*, 13 Ala. 440.

⁶ *Kingman v. Pierce*, 17 Mass. 247.

⁷ *Truettel v. Barandon*, 1 Moo. 543.

(b) But where A, the indorser of a dishonored bill, having paid the amount to B, the holder, demanded the bill from B, who referred him to his (B's) attorney; and, A refusing to go to the attorney, B said,

"Then call on Saturday, and in the mean time I will get it for you;" and A called on Saturday, but did not obtain the bill: held no evidence of a conversion. *Towne v. Lewis*, 7 Com. B. 608.

A, and by A to the defendant; such mortgages having been virtually extinguished.¹ So A executed two notes, secured by mortgage, to B and C, who transferred the notes and delivered the mortgage to the defendant. The defendant sold and transferred the notes to the plaintiff, and agreed to procure the mortgage, which was then in the hands of D, but subject to the defendant's order, and deliver it to the plaintiff. Upon his refusal to deliver it, held, the plaintiff might maintain trover, and that the defendant could not set up the defence that the notes were not purchased, but paid, and that he should cancel, but not assign, the mortgage.² So if the owner of a note delivers it to brokers for discount, and they, for the same purpose, to a bank, which receives it with an agreement to remit the proceeds to the brokers, but obtains the discount for its own benefit, and keeps the money after a demand for the note by the owner; this is a conversion.³

§ 18 *a*. But trover has been held not to lie for the conversion of a promissory note, after it has been paid or legally discharged in any manner. Though it is otherwise, if the note has not been paid or legally discharged, although the word "paid" has been written across the face of it by mistake, or by one without authority.⁴ Nor will trover lie for a note payable to the plaintiff, which has been delivered to A to collect, and to apply the amount received thereon to the payment of a note which he held against the plaintiff.⁵ And, upon the general subject of the conversion of negotiable securities it is said, in a late case, the rules and principles of law, applicable to the conversion of a chattel, are not always applicable to the conversion of a negotiable instrument, held by a person who is a party to it, and apparently its holder. Hence if the drawer of a bill, who is also in possession of it as the agent of, and in trust for, the legal holder, but authorized by him to receive the proceeds in a certain way, transfers it to a third party, who makes an advance of money upon it, and receives the bill in ignorance of the true state of the case, and believing it to be the property of the transferer; the receipt of the proceeds by the transferee (even in a manner not authorized by the legal holder), as it would not have been an act of conversion by the transferer, will not be a conversion by the transferee, though followed by the ap-

¹ *Robbins v. Packard*, 31 Verm. 570.

² *Gleason v. Owen*, 35 Verm. 590.

³ *Neale v. Wear Bank*, 3 Allen, 202.

⁴ *Lowremore v. Berry*, 19 Ala. 130.

⁵ *Canfield v. Monger*, 12 Johns. 346

appropriation and retention of the proceeds in discharge of his advance to the transferer; at all events, if the bill has been given up, on its satisfaction, to the acceptors, and no demand of it has been made until afterwards upon the transferee. But, it seems, a demand and refusal of it, while in the hands of the transferee, would have been evidence of a conversion by him; and in that case he would have been liable to the legal holder.¹ So an action for the conversion of a draft on C, purchased of B, to be sent to A, cannot be maintained, where there is no proof that it was not sent, or that A did not receive the money on it; and that the indorsement of A's name is not in his hand-writing, is no proof that he did not receive the money.² So where bills were delivered by a trader, in contemplation of bankruptcy, to the defendant, a creditor, with a view of giving him the preference, and paid to him after the bankruptcy; held, in trover by the assignees, the receipt of the money was not a conversion; and therefore it was necessary for them to prove a demand and refusal, before the bills became due.³ And damages cannot be given in trover for the detention of papers not shown to possess a pecuniary value.⁴ (a)

§ 19. With regard to the *parties* in an action of trover, it is held that trover lies against *an infant* when the goods converted came to his possession by a prior illegal contract.⁵ (See chap. 43, § 14.) So, on the other hand, an infant, who makes a sale of personal property without fraud, may rescind the sale. But he must restore the property, or the consideration received, before he can maintain his action for the property sold. And if, before a rescission, the purchaser makes a *bond fide* sale of the property, trover will not lie against him.⁶

¹ Symonds v. Atkinson, 37 Eng. L. & Eq. 585.

² Boyle v. Roche, 2 E. D. Smith, 335.

³ Jones v. Fort, 9 B. & C. 764.

⁴ Donohue v. Henry, 4 E. D. Smith, 162.

⁵ Lewis v. Littlefield, 3 Shep. 233.

⁶ Carr v. Clough, 6 Fost. 280.

(a) In reference to the measure and amount of damages for conversion of a *chose in action*; see Evans v. Kymer, 1 B. & Ad. 528; New Orleans, &c. v. De Lizardi, 2 La. An. 281; Seals v. Cummings, 8 Humph. 442; Menkens v. Menkens, 23 Mis. 252; Mercer v. Jones, 3 Camp. 477; Ingalls v. Lord, 1 Cow. 240; Alsager v. Close, 10 M. & W. 576; Delegal v. Naylor, 7 Bing. 460; Mathew v. Sherwell, 2 Taunt. 439; Parry v. Frame, 2 B. & P. 451; Clowes v. Hawley, 12 Johns. 484; Towle v. Lovet, 6 Mas. 394; Loosemore v. Radford,

9 M. & W. 657; Sewall v. Lancaster, &c. 17 S. & R. 285; Romig v. Romig, 2 Rawle, 241; Kohne v. Ins. Co. &c. 1 Wash. C. C. 158; Cutter v. Fanning, 2 Clarke (Iowa), 580; Ewing v. Blount, 20 Ala. 594; Williams v. Crum, 27 Ala. 468; Jenkins v. McConico, 26 Ib. 213; Wilson v. Conine, 2 Johns. 280.

As to trover for *slaves*; see Collier v. Lyons, 18 Geo. 648; Johnson v. Arabia, 24 Mis. 86; Bell v. Cummings, 3 Sneed, 275; Cheek v. Wheatley, 3 Sneed, 484; Sadler v. Sadler, 16 Ark. 628; Jones v. Allen, 1 Head, 626.

§ 20. It is held that the assignee of personal property cannot maintain trover in his own name, where the conversion took place before the assignment.¹ But the purchaser of property, tortiously in the hands of a third person, may after demand maintain trover therefor.² It is said, although a mere right of action for a tort is not assignable, yet, after the conversion of a chattel, the owner may sell the chattel itself, so as to give the purchaser a right to reclaim it from the wrong-doer, or maintain trover for it, after demand made in his own behalf.³ Thus where A turned cattle into the woods, and B, thinking one of them to be his, took possession of it, after which A, ignorant of B's possession, sold it to C, who was also ignorant of it; held, C might sue B in his own name.⁴ So where the defendant, in the absence of the plaintiff, but at the proper day, set apart property in satisfaction of a contract, of which the plaintiff was the legal assignee and known to be so by the defendant, and there was a subsequent conversion of the property, on the same day, by the defendant; held, the plaintiff had sufficient property and possession to maintain trover.⁵ So one in possession of, and claiming title to, property, which belonged to an insolvent before his insolvency, may maintain an action for conversion against a party who attaches it as such debtor's, and others who take the property under such attachment.⁶

§ 21. A receiver of an insolvent corporation, who is empowered by law to sue for and recover "all the estate, debts, and things in action, belonging to the corporation," may maintain trover for the conversion of the personal property of the corporation before he was appointed receiver.⁷ So trover can be maintained, by an assignee, for the property of an insolvent debtor, which he refuses to deliver.⁸ So trover can be maintained by an administrator, in all cases where the intestate would have had a right of action.⁹ And trover will lie against an administrator personally for a conversion by him, though the property came to him with the estate of his intestate.¹⁰

§ 22. In reference to *the declaration* for a conversion of property;

¹ Overton v. Williston, 31 Penn. 155; Hicks v. Cleveland 39 Barb. 573.

² Cartland v. Morrison, 32 Maine, 190; M'Ginn v. Warden, 3 E. D. Smith, 355.

³ Hall v. Robinson, 2 Comst. 293. See Gardner v. Adams, 12 Wend. 297.

⁴ Morgan v. Bradley, 3 Hawks, 559.

⁵ Seward v. Hefin, 20 Verm. 144.

⁶ Hubbard v. Lyman, 8 Allen, 520.

⁷ Gillett v. Fairchild, 4 Denio, 80.

⁸ McLeish v. Tylee, 4 Strobh. 287.

⁹ Smith v. Grove, 12 Mis. 51.

¹⁰ Burton v. Miller, 1 Har. 7. But see Stott v. Alexander, 2 Sneed, 650.

trover *pro diversis aliis bonis* has been held good.¹ Or for *plate*, generally. Or two hundred and sixty pieces of silver.² Or "pieces of ends of boards."³ Or *de decem ponderibus*, Anglicè "weights."⁴ Or twenty ounces of cloves and mace, though not shown how much of each, or that they were mixed.⁵ Or a piece of *tepee*, without saying how many yards it contained.⁶ So trover for "old iron," without saying what quantity, is good after verdict.⁷ So trover for "ten pair of curtains and valons" is, after verdict, sufficiently certain.⁸ Or "ricks of hay."⁹ And a state of demand in an action styled trespass, charging "that the defendant took in his possession certain goods and chattels the property of the plaintiff, that he refused and still refuses to deliver them to the plaintiff though requested, and has converted them to his own use;" sets out a case of trover.¹⁰ But where personal property, the subject of an action of trover, is described as "certain goods, to wit, a lot of goods in a store of A;" the description is held not sufficiently certain.¹¹ And where an action of trover was brought for a slave called John, and there was proof of the conversion of a slave, but no proof that his name was John, it was held that the plaintiff could not recover.¹² (a)

§ 23. In trover for promissory notes, the plaintiff need not state the dates or times of payment, he being presumed not to have them in his possession.¹³ But where a second count in trover for notes described them as "eleven other promissory notes, having the like drawers, indorsers, descriptions, and value as the promissory notes in the first count mentioned;" it was held bad on special demurrer.¹⁴ So where the note was described in the declaration to be for one hundred and eighty dollars, and the note proved to be in possession of the defendant was for three hundred dollars,

¹ Procter v. Burdet, 3 Mod. 69.

² Campbell v. St. John, 1 Salk. 219.

³ Knight v. Barker, 11 Mod. 66.

⁴ Hook v. Galloway, 12 Ib. 3.

⁵ Hartford v. Jones, 2 Salk. 654.

⁶ Radley v. Rudge, 2 Str. 738; acc. Bottomley v. Harrison, Ib. 809; Haslegrave v. Thompson, Ib. 810; White v. Graham, Ib. 827.

⁷ Talbott v. Spear, Willes, 70.

⁸ Taylor v. Wells, 1 Mod. 46.

⁹ Wood v. Davies, Ib. 290.

¹⁰ Glenn v. Garrison, 2 Harr. 1.

¹¹ Edgerly v. Emerson, 3 Fost. 558.

¹² Ward v. Smith, 8 Ired. 296.

¹³ The Receivers v. Neilson, 3 Green, 337.

¹⁴ Ibid.

(a) An allegation of *value* is held not a material allegation, as it goes only to the *quantum* of damages. Its omission is cured by pleading over; but, if not put in issue, it is not to be taken as true. If, on proof, the damages are nominal only, the action

may be maintained. Connoss v. Meir, 2 E. D. Smith, 314.

Where the detention only is put in issue, and the plaintiff gives no evidence of value, and a judgment is given for the sum alleged; the plaintiff can recover only the value proved. Ibid.

the variance was held fatal; although the declaration alleged, that the note in question was to pay to the plaintiff or his order a certain sum of money, to wit, one hundred and eighty dollars.¹ But if the plaintiff cannot state the precise amount of the note, he may state that it was of great value, to wit, of the value of a certain sum.² (a)

§ 24. In reference to the pleadings subsequent to the declaration, if the plaintiff's interest in the goods be not sufficient to sustain the suit, the proper plea is not guilty. And no special plea in bar can be good, unless it confess and avoid the conversion.³

§ 24 a. The statement of demand, in a suit by an administrator in a justice's court in Indiana, was substantially, that the defendant on, &c., had "swapped" a certain bay horse to A the intestate, and delivered the horse to him; and that the defendant afterwards took the horse into his possession, without the plaintiff's consent, and converted him to his own use, &c., to the plaintiff's damage, &c. Held, a sufficient statement in trover, and that it was too late after a plea to the merits to object to the statement of demand.⁴ But in New York, in an action for conversion, an answer, which denies each and every allegation in the complaint, is a denial not only of the conversion, but of the plaintiff's title; and under it evidence that the plaintiff had no title to the property is admissible.⁵

§ 25. The plaintiff having proved a taking of the goods from his premises by the defendant, and a subsequent demand and refusal, the defendant may prove, under "not possessed," that the plaintiff's wife, with his authority, gave the goods to the defendant in discharge of a debt due to him from the plaintiff.⁶

§ 26. Trover by the assignee of A, an insolvent, for ten sets of harnesses, ten horses, &c. The defendant pleaded that the plaintiff, as assignee, was not lawfully possessed of the goods, &c., as of his own property as assignee; and also a plea, stating that, before the insolvent petitioned for his discharge, the defendant sold and delivered to him divers horses and harnesses, being the

¹ Bissel v. Drake, 19 Johns. 66.

² Ibid.

³ Coffin v. Anderson, 4 Blackf. 395.

⁴ Davis v. Davis, 6 Blackf. 394.

⁵ Robinson v. Frost, 14 Barb. 536.

⁶ Ringham v. Clements, 12 Ad. & Ell. N. S. 260.

(a) In trover for a promissory note, it is not necessary to give notice to the defendant to produce the note. If shown to be in his possession or under his control, the action is notice. Bissel v. Drake, 19 Johns. 66.

same as those mentioned in the declaration, for £150, on the terms that the defendant might at any time, until payment of the price, take and retain the horses and harnesses as a pledge and security for such part of the price as should remain unpaid, until payment thereof; that at the time of the alleged conversion, £22, part of such price, remained due; and that, after the plaintiff became possessed as assignee, the defendant took the said horses and harnesses into his possession as such pledge and security, &c.; which is the conversion in the declaration mentioned. To this plea the plaintiff new assigned, that the action was brought, not for the supposed conversion in the plea mentioned, but for the conversion of ten sets of harnesses, ten horses, &c., other than and different to those in the plea mentioned, &c.; to which the defendant pleaded not guilty. Held, that the plaintiff was entitled, under the new assignment, to give in evidence a conversion by the defendant of five horses, two of which were, and three were not, the subject of the agreement stated in the plea.¹

§ 27. With respect to the amount and measure of *damages* for conversion, the law cannot be considered as well settled. In general terms, the *value of the property* is the standard;² (a) but as to the elements which constitute that value, different cases adopt in many respects widely different views. Among the points of difference may be mentioned the following: The *time* at which the value is to be estimated; whether it is the actual time of conversion, or some subsequent period, at which the value would have been increased; or, in other words, the *profits* which the plaintiff might have realized by retaining the property.³ So whether damages can be allowed for *detention*, and consequent loss of profits from the use of the thing, or the amount paid for the hire of others of like kind.⁴ So, whether the peculiar value of the

¹ Bolton v. Sherman, 2 M. & W. 395.

² See Finch v. Blount, 7 C. & P. 478; Cook v. Hartle, 8 Ib. 568; Stevens v. Low 2 Hill, 132; Parker v. Norton, 6 T. R. 695.

³ See Carter v. Feland, 17 Mis. 383; Hillebrand v. Brewer, 6 Tex. 45; Greening v. Wilkinson, 1 C. & P. 625; Whitehouse v. Atkinson, 3 Ib. 344; Shepperd v. Johnson, 2 E. 210; Shotwell v. Wendover, 1 Johns. 65; Kennedy v. Strong, 14 Ib. 128;

Hallet v. Novion, Ib. 273; 16 Ib. 327; Greenfield, &c. v. Leavitt, 17 Pick. 1; Fowler v. Gilman, 13 Met. 267; Lillard v. Whittaker, 3 Bibb, 92; Schley v. Lyon, 6 Geo. 530; Watt v. Potter, 2 Mas. 77; Read v. Fairbanks, 24 Eng. L. & Eq. 220; 13 C. B. 692; Wood v. Bell, 6 Ell. & B. 355; 5 Ib. 772.

⁴ Davis v. Oswell, 7 C. & P. 804; Bodley v. Reynolds, 8 Ad. & E. (N. S.) 779.

(a) A general description, by witnesses, of chattels for which the suit is brought, is sufficient, if enabling the jury to estimate

their value, to authorize a verdict for actual damages. Hall v. Burgess, 5 Gray, 12.

property to *the plaintiff*, arising from personal considerations, can be estimated in the damages; as in case of a family picture.¹ And, in general, whether the action of trover is distinguishable from that of trespass, in the exclusion of evidence of damages *merely in aggravation*, or vindictive damages.² The allowance of *interest* is another point in the question of value.³ Another question relates to the measure of damages, where the precise quality of the article, as distinguished from others of the same general class, cannot be ascertained, in consequence of its non-production by the defendant.⁴ So the qualified nature of the plaintiff's property may materially affect the amount of damages; as in case of pledge, lien, and other form of bailment.⁵ And, in general, various questions may arise as to the admissibility of evidence in *mitigation* of damages.⁶ Upon all these several points, as has been suggested, the authorities are somewhat conflicting; and it is foreign from our plan to do more than refer to the leading cases, which will be found in the margin.

§ 28. The question has often arisen, whether a party, who has once done an act which might amount to conversion, can avoid his liability therefor by subsequent restoration of, or satisfaction for, the property. (a) Thus, where the defendants had in their possession a boiler belonging to the plaintiffs, and the plaintiffs demanded it, and the defendants at first refused to restore it, but afterwards, and before the issuing of the writ, tendered it; held, no conversion.⁷ So, if a slave is hired for a particular service,

¹ See *Butler v. Hicks*, 11 Sm. & M. 78; *Hull v. Clark*, 14 Ib. 187; *Dennis v. Barber*, 6 S. & R. 420; *Berry v. Vantvies*, 12 Ib. 89; *Taylor v. Morgan*, 3 Watts, 333; *Harger v. M'Mains*, 4 Ib. 418.

² See *Baker v. Wheeler*, 8 Wend. 505; *Whitehouse v. Atkinson*, 3 C. & P. 344; *Greening v. Wilkinson*, 1 Ib. 625; *Alder v. Keighly*, 15 M. & W. 117.

³ See *Cutter v. Fanning*, 2 Clarke (Iowa), 580; *Bank, &c. v. Reese*, 26 Penn. 143; *Mercer v. Jones*, 3 Camp. 477; *Dillenback v. Jerome*, 7 Cow. 294; *Hyde v. Stone*, 7 Wend. 354; *Bissell v. Hopkins*, 4 Cow. 53; *Baker v. Wheeler*, 8 Wend. 505; *New Orleans, &c. v. De Lizardi*, 2 La. Ann. 281; *Stevens v. Low*, 2 Hill, 132; *Jacoby v. Laussat*, 6 S. & R. 350.

(a) See *Cook v. Hartle*, 8 C. & P. 568; *Murray v. Barling*, 10 Johns. 172; *Reynolds v. Shuler*, 5 Cow. 323; *Kaley v. Shed*, 10 Met. 317. A payment, in good faith, of the proceeds of the property con-

⁴ See *Armory v. Delamirie*, 1 Str. 505.

⁵ See *Jarvis v. Rogers*, 15 Mass. 389; *Stearns v. Marsh*, 4 Denio, 227; *Ingersoll v. Van Bokkelin*, 7 Cow. 670; 5 Wend. 315; *Lyle v. Barker*, 5 Binn. 457; *Davidson v. Gunsolly*, 1 Mich. 388; *Horton v. Reynolds*, 8 Tex. 284; *Haughton v. Benbury*, 2 Jones, Eq. 337; *Fowler v. Gilman*, 13 Met. 267; *Chamberlin v. Shaw*, 18 Pick. 278.

⁶ See *Mountford v. Gibson*, 4 E. 441; *Baldwin v. Porter*, 12 Conn. 473; *Locke v. Garrett*, 16 Ala. 698; *Mullen v. Ensley*, 8 Humph. 428; *Harker v. Dement*, 9 Gill, 8; *Carter v. Streater*, 4 Jones, 62.

⁷ *Hayward v. Seaward*, 1 Moo. & S. 459.

verted, for the owner, of which he has received the benefit, may be given in evidence in mitigation of damages. *Doolittle v. McCullough*, 7 Ohio (N. S.), 299.

and is afterwards employed in a different one, this is a conversion ; but if, with full knowledge of the conversion before the expiration of the term, the master receives the stipulated hire for the entire term, he is estopped from afterwards bringing trover.¹ So where the defendant, a sheriff, who held goods taken in execution, delivered them to the plaintiffs, assignees of a bankrupt, after an action of trover had been commenced by them, and the plaintiffs accepted the goods without condition ; held, they could not recover in the action more than nominal damages ; at all events, not without alleging special damage.² So a cow, going at large in the highway without a keeper, joined a drove of cattle, without the knowledge of the driver, the defendant, and was driven to a distant place, and there pastured with the other cattle. The plaintiff, the owner of the cow, called on the defendant, after his return, made inquiries, and demanded the cow, and, on the return of the drove, a few months afterwards, the defendant delivered the cow to the plaintiff, who received her. Held, the omission to deliver the cow on demand was not evidence of a conversion.³

§ 28 *a*. But the general doctrine is laid down, that a temporary conversion will render a defendant liable ; for a conversion which has once taken place cannot be cured ; although a redelivery after conversion may go in mitigation of damages.⁴ So where personal property is sold, on condition that the title shall not vest until payment of the price ; if, after the time of payment has expired, the price not being paid, a creditor of the vendee attach the property, he cannot defeat the vendor's right to an action of trover for the property, by tendering to him the price and interest. And in such action, brought against the attaching creditor, the rule of damages is the value of the property at the time of the attachment.⁵ So the defendant in trover cannot justify the detaining of goods, for money laid out upon them without authority ; but it may be deducted in damages.⁶ So where the plaintiff in trover unconditionally receives the goods in question, after suit brought, he is nevertheless entitled to recover the excess in value at the time of conversion above the value at the time of delivery, without an averment of special damage.⁷ (*a*)

¹ *Moseley v. Wilkinson*, 24 Ala. 411.

² *Moon v. Raphael*, 2 Bing. N. R. 310.

³ *Wellington v. Wentworth*, 8 Met. 548.

⁴ *St. John v. O'Connell*, 7 Port. 466.

⁵ *Buckmaster v. Smith*, 22 Verm. 203.

⁶ *Stone v. Lingwood*, 1 Str. 651.

⁷ *Rank v. Rank*, 5 Barr, 211.

(*a*) In this connection we may refer to certain points of *practice* in the English

and American courts, more particularly relating to the action of trover. It has been held, that the Court will not stay proceedings in an action of trover, on the terms of the defendant's delivering up the goods to the plaintiff, or paying their value, where such value is not ascertained. *Tucker v. Wright*, 11 Moore, 500.

And, in trover for money, the Court gave leave to bring the whole money declared for into Court; but said they could only do it in this case, and not in trover for goods. *Anon.* 1 Strange, 142.

In trover for slaves, the jury found for the plaintiff \$2700, "which can be satisfied by delivering to the plaintiff the said slaves within ten days." The defendant did not deliver them, and two of them sickened and died within ten days. Held, that a delivery of the rest after the time did not justify a set-off of their value, and that of those who died, upon an execution on the verdict. *Willis v. Willis*, 22 Geo. 290. See *Fisher v. Prince*, 3 Burr. 1363; *Earle v. Holderness*, 4 Bing. 462; *Shotwell v. Wendover*, 1 Johns. 65; *Stevens v. Low*, 2 Hill, 132; *Whitten v. Fuller*, 2 H. Bl. 902.

The County Court (in Vermont) has the power, in an action of trover, to permit by order the return of the property in mitigation of damages, and, on payment of costs by the defendant, to order that the plaintiff shall thereafter proceed at his peril as to subsequent costs. *R. & W. &c. v. Bank, &c.* 32 Verm. 639.

This power, though in proper cases discretionary, cannot be used when the defendant has acted wilfully in taking or keeping the property, when the property has deteriorated, or when its value is in dispute; but may be, though the plaintiff

claims damages, either general or special, beyond the value of the property. *Ib.*

The plaintiffs, a railroad company, deposited with the defendants its own mortgage bonds, payable to bearer, to be held, upon the performance of a certain condition, for a specified purpose. This condition was not performed, but the defendants in good faith claimed to hold the bonds for another purpose, and refused to surrender them on demand. These bonds were never worth above par, but, after their conversion by the defendants, they greatly depreciated in market value. The plaintiffs brought trover for the bonds, alleging, in addition to general damage, that they had been deprived of the means of negotiating them, and had been put to expense in raising funds to relieve their property from attachment. Before trial, the defendants offered in court to deliver the bonds to the plaintiffs, and pay them their costs already accrued, and the County Court made an order, allowing them to bring such bonds and costs into court for the plaintiffs, and that, if the latter refuse to receive them, they must proceed at their peril as to subsequent costs, unless they succeeded in recovering more than nominal damages above the face of the bonds. Held, the case was one proper for the exercise of the power of the Court to make such order in their discretion. Also, the defendants having complied with this order, and the plaintiffs having refused to accept such compliance as a satisfaction of the suit, but having proceeded to trial, and proved no facts materially different from those appearing when the order was granted; they were entitled to recover only nominal damages. *Ib.*

CHAPTER XXVI.

FRAUD.

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| 1. Must be connected with <i>contract</i> .
2. General principles; what constitutes an actionable fraud.
5. Fraud of a <i>seller</i> .
7. Fraud of <i>purchaser</i> ; whether creditors | and subsequent purchasers are affected by such fraud; when a seller loses his right of action.
11. False recommendation of credit, &c. |
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§ 1. ANOTHER tort or wrong to *property* is *Fraud*. This, from its very nature, can exist only in connection with some form of *contract*, and was therefore incidentally considered at some length under the head of *torts as connected with contracts*. (See chap. 1.) Moreover, fraud is much more frequently set up as a defence to a suit at law, or in equity relied upon as a ground for rescinding or setting aside an executed or executory agreement, than made the foundation of a distinct action for damages. (a) For these reasons, it does not require to be noticed, in the present connection, at great length.

§ 2. Fraud or deceit, accompanied with damage, is a good cause of action.¹ In some instances there may be a legal fraud, even without an intention to deceive.² (b) And, on the other hand, a

¹ *Castleman v. Griffin*, 13 Wis. 535; *Moens v. Heyworth*, 10 M. & W. 147; *Barney v. Dewey*, 13 Johns. 224; *Morgan v. Bliss*, 3 Mass. 111; *Farrar v. Alston*, 1 Dev. 69; *Idle v. Gray*, 11 Verm. 615. *M'Donald v. Trafton* 15 Maine, 225; *Cunningham v. Smith*, 10 Gratt. 255; *Elton v. Larkins*, 5 C. & P. 86.

² *Murray v. Mann*, 2 Exch. 538. See

(a) As to the right of imprisonment for fraud, see *M'Cool v. The State*, 23 Ind. 127.

Positive fraud vitiates everything, — contracts, obligations, deeds, and even records and judgments; and contracts entered into upon fraudulent representations are voidable at the election of the party defrauded. If one party designedly misrepresent a material fact, which it was his duty to disclose, and upon which the other had a right to rely, and did rely, for the purpose of misleading and deceiving the latter, to his injury, he is guilty of a positive fraud, which will authorize the latter party to

avoid the contract. *Jones v. Emery*, 40 N. H. 348.

(b) As to the effect of a mere *fraudulent intent*, see *Canham v. Barry*, 29 Eng. L. & Eq. 290; *Abbey v. Dewey*, 25 Penn. 413.

The gist of an action for wilful and fraudulent representations and concealments is the actual evil intent of the defendant, which, however, is not a necessary conclusion of law from his acts. It is therefore competent for him to testify that he did not intend to cheat. *Pope v. Hart*, 35 Barb. 630.

representation may be fraudulent, though *literally true*, if it deceives, and is intended to deceive.¹ And where one party designedly produces a false impression, in order to mislead, entrap, or obtain undue advantage over another, there is fraud,—an evil act, with an evil intent.² Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments, which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue unconscientious advantage is taken of another.³ It is often a *conclusion of law*, which courts will infer from acts and circumstances, whether the existence of a fraudulent purpose, in the strict sense, be proved or not.⁴ But fraud is not to be presumed from the provisions of an instrument which admits of a contrary construction.⁵ And it is said, fraud *is never to be presumed*; it must be *clearly proved* by the party making the charge, for the presumption of law is always against bad faith.⁶ And it is to be further remarked, that the law will not lend its aid to either of the parties to a fraudulent executory contract in enforcing the same, nor to rescind or disturb one which has been executed, founded in immorality, or upon transactions forbidden by law.⁷ (See chap. 4.)

§ 3. In order to maintain an action for fraud, it is sufficient to show that the defendant knowingly uttered a falsehood, with the design to deprive the plaintiff of a benefit and acquire it to himself; and damage naturally flowing from the plaintiff's belief. (a) Thus a declaration in case stated, that the plaintiff was a printer of silk goods, and had delivered to the defendant a lot of such goods, in which were woven fabrics of silk, printed by the plaintiff with a design for the ornamenting of them, which had been published by the plaintiff to the defendant and others; and the plaintiff was about to print other fabrics of silk with the same

¹ Denny v. Gilman, 26 Maine, 149.

² Peter v. Wright, 6 Ind. 183.

³ Gale v. Gale, 19 Barb. 249.

⁴ Story v. Norwich, &c. 24 Conn. 94;

Polhill v. Walter, 3 B. & Ad. 114; Hart v. Tallmadge, 2 Day, 381; Freeman v.

Baker, 5 B. & Ad. 797; Arnold v. Maynard, 2 Story, 352.

⁵ Bank, &c. v. Talcott, 22 Barb. 550.

⁶ Stewart v. English, 6 Ind. 176; 35

Barb. 630; Coulson v. Coulson, 5 Wis. 79;

Flint v. Jones, Ib. 424.

⁷ Westfall v. Jones, 23 Barb. 9.

(a) See chap. 1, upon the question, whether it is as much a fraud, when making a sale, to assert that which is not known to be true, as to assert what is known not to be true. See also, that it is,

Bennett v. Judson, 21 N. Y. (7 Smith) 238; Craig v. Ward, 36 Barb. 377. But see Holmes v. Clark, 10 Iowa, 423; Courtney v. Carr, 11 Ib. 295.

design, and to publish the same in the way of his trade for gain; of all which the defendant had notice; but the defendant, contriving to deceive, injure, and defraud the plaintiff, and induce him to desist from printing more with the design, and to deprive him of the gains he would have made, and to cheat him of the benefit of the design, and to acquire the same for the sole benefit of the defendant, and to put the plaintiff to expense; falsely, fraudulently, and deceitfully represented to the plaintiff that in the lot there was a copy of a registered pattern (see stats. 5 & 6 Vict. c. 100, 6 & 7 Vict. c. 65), and that, the parties having asked the defendant for the printer, the defendant was obliged to give the plaintiff's name; and the parties intended to proceed against the plaintiff by injunction and order through the Court of Chancery (thereby meaning that the design was a copy of a design which had been registered, and the copyright in which was subsisting, according to the statutes respecting copyrights of designs, and that the parties interested in the design had asked the defendant who was the printer, and the defendant had been obliged to give the plaintiff's name as printer, and the parties intended to proceed against the plaintiff, to prevent him from pirating the design, by injunction and order through the Court of Chancery); whereas, in truth, no such design, or design resembling it, had been registered according to the statutes aforesaid; and there were no parties interested in the design; nor had any parties asked the defendant for the printer; nor had the defendant given them the plaintiff's name; nor did any parties intend to proceed against the plaintiff by injunction, &c., as the defendant, at the time of making the representation, knew; by means of which representation the plaintiff, believing it to be true, was induced to travel a long distance for the purpose of inquiring into the matters represented, and satisfying the supposed parties, as it was reasonable for him to do under the circumstances; and was induced to abstain from further printing with the design, which he had orders to do, and from selling silk handkerchiefs printed with the design; and the defendant, by means of the premises, enjoyed the benefit of the design to the exclusion of the plaintiff, and printed with the design, and sold, for his profit, silk handkerchiefs, and took the profits, without the competition of the plaintiff, and to his exclusion. On general demurrer, held, that the declaration showed a cause of action; and that the innuendo was unnecessary,

and could not therefore be the ground of an objection to the declaration.¹ Upon similar ground, if mortgaged goods are attached conformably to a statute in a suit against the mortgagor, and the mortgagee, in pursuance of the statute, demands payment of the attaching creditor, knowing that his claim is wholly false, and thereby induces the creditor to abandon his attachment, and thus lose his debt; he is liable to such creditor for the damages sustained, in an action for the deceit.²

§ 4. But, in an action for fraud, the plaintiff will be confined to the precise ground of action set forth in his declaration. Thus, in an action on the case against the defendant, for falsely representing that he had funds in his hands, for which he was chargeable as the trustee of a debtor of the plaintiff, whereby the plaintiff was induced to sue out a trustee process, from which the defendant was discharged on his answer; the plaintiff cannot prove that the defendant's statement, on oath, in his answer, that he had no funds, was false.³ So an action on the case by the owners of a market, who had a prescriptive right of toll on all corn brought into the market to be sold, and there sold; alleging that the defendant, intending to deprive them of their toll, fraudulently bought corn in the market by sample, knowing that the commodity was not there in bulk at the time of the sale, whereby the plaintiffs were prevented from taking their toll; is not sustained, by evidence of the mere fact, of such purchase by sample in the market, though with knowledge of the plaintiff's claim of toll, coupled with the fact, of not paying the toll on demand, afterwards, when the corn was delivered to the defendant in the same borough, but out of the market; for *non constat* that the corn would otherwise have been brought into the market, or that the defendant did any act to induce the owner of it not to bring it there in the first instance. Neither will the fact of such purchase by sample in the market, though coupled with the subsequent delivery out of the market, sustain a count for toll as for corn brought into the market and there sold.⁴

§ 5. We have already — chapter 1 — considered at some length the wrong of fraud or deceit in the contract of *sale*. It may be here added, that an action on the case may be maintained by the

¹ *Barley v. Walford*, 9 Ad. & Ell. N. S. 197.

² *Merrill v. Gold*, 1 Cush. 457.

³ *Tewkesbury, &c. v. Diston*, 6 E. 438.

⁴ *Brown v. Castles*, 11 Cush. 348.

purchaser or lessee of lands against the seller or lessor, for fraudulently misrepresenting the *boundaries* of the lands. And the intent to defraud need not be established by direct proof, but may be made out by circumstantial or presumptive evidence. So a vendor of real estate is guilty of fraud, if, knowing that he has no title to a portion of the lands sold, he wilfully suppresses that fact.¹ So also a vendor of land is liable for a false representation as to its location, if the purchaser have not at the time an opportunity of seeing the land. Or for a misrepresentation as to the cost of the land. But not for a mere expression of opinion of its value.² So it has been held, that, even in case of the *gift* of a chattel, which the donor affirms to be his, if the donee is afterwards evicted by the rightful owner, he may maintain an action against the donor.³ And the false representation, in cases of this nature, need not always have been made directly to the plaintiff himself. Thus the defendant, being about to sell a public house, falsely represented to A, who had agreed to purchase it, that the receipts were £180 a month; and A, with the knowledge of the defendant, communicated this representation to the plaintiff, who became the purchaser instead of A. Held, this action, for fraud, might be maintained.⁴ (a)

§ 6. In case of fraudulent *warranty*, the buyer may sell the property for the best price he can obtain, without first offering to return it; and, if he act with common prudence and discretion in disposing of the property, the rule of damages, in an action for deceit brought by him against the seller, will be the difference between the price which he obtained, and what the property would have been worth if it had been as warranted.⁵ Or, in case of fraud in a sale on the part of the seller, the buyer may rescind the sale, and recover back the consideration paid, in an action for money had and received. But he must restore, or offer to restore, all that he has received under the contract. He cannot rescind in

¹ Clark v. Baird, 5 Seld. 183; Whitney v. Allaire, 1 Comst. 305.

² Sandford v. Handy, 23 Wend. 260.

³ Barney v. Dewey, 13 Johns. 224.

⁴ Filmore v. Hood, 5 Bing. N. R. 97.

⁵ Woodward v. Thacher, 21 Verm. 580.

(a) If the owner of a lease employs another to greatly exaggerate its value to the landlord, and to agree to purchase the whole property of him at more than its value, if he would buy the lease from the owner, for the purpose of defrauding the landlord into a purchase of the lease; such exaggerated statements of its value cannot

be excused as mere "puffing," such as a vendor is allowed to make use of. Neither does the readiness with which the landlord acceded to the suggestion, though he knew the price at which the other party proposed to purchase was too high, excuse the fraud on the part of the confederates. Adams v. Soule, 33 Verm. 538.

part and affirm as to the residue, even where the sale is of several articles at distinct prices for each.¹

§ 7. While a *seller* is liable to an action for fraud in the sale, on the other hand (see i. 16), a sale and delivery of goods, procured through a false representation of *the buyer* in regard to his solvency and credit, passes no title as between the parties; and the seller or his representatives may maintain either trover or replevin in the *detinet*, or trespass or replevin in the *cepit*, against him. It is held, that, as the general and absolute ownership remains in the vendor, not only the original interference on the part of the purchaser with the property, but also any subsequent acts of ownership by him, may be treated as an unlawful and tortious taking.² The purchaser is held to be in all respects liable to be treated as a trespasser; and he cannot avail himself of the conveyance to justify the taking, any more than the detention, of the property.³ And a sale of goods procured by the fraud of the vendee is equally void, as between the parties, whether the fraud be indictable or not.⁴ So where a *creditor*, by fraud or deception, obtains the goods of his debtor, the property is not changed, and he cannot apply them to his debt, but the debtor may maintain trover against him.⁵ And where the question is, whether a purchaser of goods procured them through fraud, distinct purchases made by him of others, under similar circumstances, at or about the same time, and when the like motive as the one imputed may be reasonably supposed to have operated, are admissible in evidence against him, with a view to the *quo animo*.⁶ But where the purchaser, being insolvent, but *not knowing the fact*, represents to the seller that he is able to pay one hundred cents on the dollar and something more, and thereby induces him to sell him goods; the sale is not void for misrepresentation.⁷ Nor where the seller is not induced to enter into the contract by the false representations of the purchaser.⁸ And where there is an attempt to impeach the good faith of a purchaser, on the ground of fraudulent suppression of information obtained from a letter, he may show the contents of the letter to repel the presumption of fraud.⁹

¹ Voorhees v. Earl, 2 Hill, 288.

² Cary v. Hotailing, 1 Hill, 311. See Ferguson v. Carrington, 9 B. & C. 59; Thompson v. Rowe, 16 Conn. 71.

³ McKnight v. Morgan, 2 Barb. 171.

⁴ Cary v. Hotailing, 1 Hill, 311.

⁵ Woodworth v. Kessain, 15 Johns. 186.

⁶ Cary v. Hotailing, 1 Hill, 311. See

Ferguson v. Carrington, 9 B. & C. 59; Load v. Green, 15 M. & W. 216.

⁷ McCrackan v. Cholwell, 4 Seld. 133.

⁸ Bronson v. Wiman, 4 Seld. 182.

⁹ Ibid.

§ 8. It has been held, that a *preconceived design not to pay for goods purchased* is such a fraud as will avoid the sale.¹

§ 9. But it is to be further remarked, that a party who obtains the goods from the fraudulent purchaser, without notice of the fraud, in the usual course of trade, — that is, who gives value for them, makes advances upon them, incurs responsibilities upon the credit of them, or receives them in pledge for money or property loaned upon the strength of them, — may hold the goods against the vendor, being a *bond fide* purchaser.² Although it has been questioned, whether contracts of sale procured by fraud are always binding, even as in favor of *bond fide* purchasers;³ it being laid down as the general rule, that a vendee of goods, who, by reason of fraud in the purchase, has acquired no title against the vendor, can convey none.⁴ And this rule is still so far adopted, that a transfer of the goods by assignment to a *bond fide* creditor of the original purchaser, in payment of a pre-existing debt, will not vest the title in such creditor. On the contrary, if the creditor detains the goods after demand, the vendor may maintain replevin against him.⁵ And it is sufficient to impeach the *bona fides* of a purchase of chattels from a fraudulent vendee, that the purchaser had notice of such facts and circumstances, as would naturally excite the suspicion of a man of ordinary prudence and caution, and forbore to make inquiry.⁶ (a)

§ 10. But it is to be further stated, that an action for deceit cannot be maintained, by a party who has himself been wanting

¹ *Ash v. Putnam*, 1 Hill, 302.

² *Root v. French*, 13 Wend. 570; *Mowrey v. Walsh*, 8 Cow. 238.

³ *Cary v. Hotailing*, 1 Hill, 311.

⁴ *Ash v. Putnam*, *Ib.* 302.

⁵ *Root v. French*, 13 Wend. 570.

⁶ *Danforth v. Dart*, 4 Duer, 101.

(a) A member of an insolvent partnership at Syracuse, consisting of two persons, purchased goods in Philadelphia on the credit of the firm, under a misrepresentation of its circumstances. The goods were forwarded to Syracuse, but, before they arrived, the partner not privy to the purchase apprised the vendors by letter of the insolvency of the firm, and, among other things, declared the goods subject to their order. The vendors then immediately took steps to reclaim the goods, and actually succeeded as to a part. The residue, however, before the vendors found them, were seized and sold by the sheriff of Schenectady, while lying in a warehouse at that place. In an action by the vendors against

the sheriff, held, that the case should have been submitted to the jury on the question, whether there was such fraud in the purchase as avoided the sale; and a new trial was granted, because the Circuit Judge nonsuited the plaintiffs. *Ash v. Putnam*, 1 Hill, 302.

In regard to the *materiality* of representations alleged to be fraudulent, see *Geddes v. Pennington*, 5 Dow. 164; *Green v. Gosden*, 4 Scott, N. R. 13; 3 M. & G. 446; *Vane v. Cobbold*, 1 Exch. 798.

The question is held to be for the jury. *Huguenin v. Rayley*, 6 Taun. 186; *Bidault v. Wales*, 20 Mis. 546; *Westbury v. Aberdein*, 2 M. & W. 267; *Von Lindeneau v. Desborough*, 8 B. & C. 586.

in reasonable care ; more especially in the absence of any express misrepresentation. Where both parties have equal means of knowledge, the law will not protect the negligent party in case of misrepresentation by the other.¹ Thus where a note was taken for a horse, in a trade between A and B, and A took the note after B's conversation had thrown suspicion upon it, and also after his refusal to indorse it; held, in an action by A for deceit against B, that, as A had taken the note at his own risk, the rule of *caveat emptor* must apply; and, unless B appeared to have used some artifice or practice to conceal the defects in the note, he was not liable for deceit.² And it is to be further remarked, that the rights and claims, either of buyer or seller, against the other party to the contract, on the ground of fraud, may be lost by *waiver* or *acquiescence*. Thus where a sale of goods is procured by fraud, the vendor still retains his legal right in them, unless, after discovering the fraud, he assent to the sale, either positively, or by such delay in reclaiming the goods as authorizes the inference of an assent.³ (a) And his subsequent declarations may be proved, to show an affirmance of the contract, with full knowledge of the facts.⁴ So if a party has himself received property, in exchange for the property parted with by him, by means of alleged fraud, he must return or offer to return the property received, before he can maintain an action for his own property; unless the other party has by his acts or declarations waived the right to such return. Upon this ground, a party to an exchange of horses, who is deceived by false representations, cannot maintain an action of replevin for his horse, against the party who deceived him, until he has rescinded the contract, and returned, or offered to return, the horse received by him. Thus, on an exchange of horses by A and B, A was deceived by B's false representations, and sued out a writ to replevy the horse delivered by him to B, and went with an officer to B's premises, and there left the horse received of B,

¹ Bell v. Byerson, 11 Iowa, 233.

² Smith v. Andrews, 8 Ired. 3. See Moore v. Turbeville, 2 Bibb, 602; Saunders v. Hatterman, 2 Ired. 32.

³ Ash v. Putnam, 1 Hill, 302.

⁴ Bronson v. Wiman, 4 Seld. 182.

(a) That, in order to constitute a legal fraud, available either as a defence or a ground of action, the party must have been deceived, and acted in consequence of the fraud; see Taylor v. Fleet, 1 Barb. 471; Stafford v. Newsom, 9 Ired. 507; Tuckwell

v. Lambert, 5 Cush. 23; Addington v. Allen, 11 Wend. 375; Young v. Hall, 4 Geo. 95; Clopton v. Cozart, 13 Sm. & M. 363; Connersville v. Wadleigh, 7 Blackf. 102; Anderson v. Burnett, 5 How. (Miss.) 165.

without any communication with B. The officer then took the other horse on the writ, and afterwards read the writ to B; and A at the same time informed B that his horse was returned. Held, the action of replevin could not be maintained, it being commenced before the contract was rescinded by the return of B's horse. But, on another trial, it further appeared, that, A and B having exchanged horses, on a false representation by B that his horse was kind; on a trial of the horse in the presence of B, the horse was found to be unkind, and B requested A to make a further trial, which A refused to do. B then promised A that he would meet him on the next Monday, and "make all right, and settle the affair of the horses." On Monday, B sent a message to A that he would not take the horse back. A thereupon sued out a writ of replevin against B, without any further communication with him, and took the horse which he had delivered to B in exchange. Held, the action of replevin might be maintained; as a jury would be warranted in finding, either that A had offered to return the horse to B, and that an answer had by mutual consent been postponed till Monday, and that B's message on that day was a refusal of that offer; or that the message was an express waiver of any further offer to return the horse.¹ And, in regard to *waiver*, it may be further remarked, that where, in case of misrepresentation, by a lessor, for example, as to the territorial limits of the property, the lessee takes possession at the commencement of the term, and after having discovered the fraud, he waives thereby only his right to rescind the contract, but not to recover damages for the fraud.² So, in case of a purchase of personal property, a party does not waive his right to damages, by merely acting in affirmance of the contract after discovery of the fraud.³ (a) More especially a party is not precluded by mere acts of acquies-

¹ *Thayer v. Turner*, 8 Met. 550.

² *Allaire v. Whitney*, 1 Hill, 484.

³ *Whitney v. Allaire*, 1 Comst. 305.

(a) A, being deceived by false representations made to him by B, sold goods to B, and took his promissory note for the price. B sold part of the goods, and received payment therefor. A rescinded the contract of sale on the ground of the fraud, and brought an action against B to recover the money received by him for the goods, and directed the officer to attach B's property, but did not specify the property to be attached. The officer attached, on A's writ,

and on other writs, against B, the residue of the goods sold to him by A, and A entered and prosecuted his said action. A afterwards gave notice to the officer that he had rescinded the sale, and, after demanding of the officer the goods attached, brought replevin against him. Held, A had not affirmed any part of the sale, and might maintain the action. *Browning v. Bancroft*, 8 Met. 278.

cence from setting up fraud as a *defence*. Thus A executed a memorandum under seal, in February, stating that he had hired of W a certain lot in the city of New York, for one year from the first of May next, for \$1000 rent. He was induced to make the contract, through the fraudulent representations of W, that the lot comprehended a certain other parcel of land, which, as it afterwards turned out, belonged to the corporation. A discovered the fraud before the first of May; and on that day, having obtained a lease of the parcel owned by the corporation, took possession of the whole, and occupied during the year. Held, in an action by W for rent, that A was entitled to a deduction, by reason of the fraud, of at least what he was in good faith obliged to pay for the corporation lease; that A, immediately after discovery of the fraud, might have elected to treat the lease as entirely void; not having done so, however, but having occupied under it during the term, his only remedy was by action or *recoupment* for the damages.¹

§ 11. Another instance of fraud or deceit, for which an action may be maintained, is that of the *false recommendation* of a third person, whereby the plaintiff has been led to trust him, and thereby suffer pecuniary loss. (See ch. i. § 9.) In cases of this kind, it is held not necessary to show an intent to defraud any particular individual; but whoever is defrauded may maintain an action. (a) But, on the other hand, the defendant may show, that he believed the representations made, and was himself duped by the artifice of the person recommended.² Thus an action on the case for a false affirmation lies, where a certificate known to be false is given to an individual, that he is an honest, industrious, reputable, and otherwise good citizen, of good morals and habits, and that, in the opinion of the defendant, he would honorably endeavor to perform any engagement he should make, in any matter of business or credit; if the person recommended, on the strength of such certificate, obtains goods on credit. And evidence is admissible, that the party was insolvent and worthless when the

¹ *Allaire v. Whitney*, 1 Hill, 484.

² *Williams v. Wood*, 14 Wend. 126.

(a) But a right of action, for a false and fraudulent representation of the solvency of a purchaser, is not *assignable*. Nor would it survive to the personal representatives of the party defrauded. *Zabriskie v. Smith*, 3 Kern. 322.

A fraudulent representation that a person is of good credit, whereby another is in-

duced to sell him merchandise, or indorse his note, although made in order to enable him to pay a debt due from him to the person making the representation, is within the statute of frauds, and will not support an action, unless in writing. *Kimball v. Comstock*, 14 Gray, 308; *Mann v. Blanchard*, 3 Allen, 386. See p. 147.

certificate was given.¹ (a) So a party is liable to an action, who, in bad faith, and with a view of inducing others to credit a merchant, represents that he has examined into his affairs, and considers him solvent and worthy of credit, and that he is going on well, when such merchant is in fact insolvent, and the party making the representations has not investigated his affairs, and knows nothing of his business condition, except that he is largely indebted.² So the responsibility of a party, for false and fraudulent representations, is not necessarily limited to the credit obtained thereby at or immediately subsequent to the time they were made. And where the representations were made in April, and the plaintiffs then, and at various times after, until November, sold the party merchandise on credit; held, it was for the jury to decide, whether the credits given during the summer and fall were induced by the representations.³

§ 12. In an action for falsely and fraudulently representing a person as solvent, the complaint should aver substantially, although not necessarily in direct and technical language, and the plaintiff must prove, that the representations were made with intent to deceive and defraud. But a variance in some particulars between the fraudulent representations alleged and those proved is not material, unless the defendant prove at the trial that he was misled thereby to his prejudice.⁴ And, in an action on the case for fraudulent representation as to the credit of another, though the statute requires the representation to be in writing, it is held that any evidence, parol or otherwise, is admissible to prove the representation false; and it is for the jury to say, upon all the facts, whether the representation was calculated to mislead and did mislead the plaintiffs.⁵

¹ *Williams v. Wood*, 14 Wend. 126.

² *Zabriskie v. Smith*, 3 Kern. 322.

³ *Ibid.*

⁴ *Zabriskie v. Smith*, 3 Kern. 322.

⁵ *Iasigi v. Brown*, 17 How. 183. See p. 146, n.

(a) Whether or not it was proper for the Judge, in charging the jury, to say that the insolvency and death of the person recommended was sufficient evidence that the debt had not been paid; yet, if he

added, that the jury must be satisfied, from all the testimony, that the debt had not been paid, there is no ground for a new trial. *Williams v. Wood*, 14 Wend. 126.

CHAPTER XXVII.

WASTE.

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|---|---|
| 1. Applies only to real property. | 11. Change in the use of land. |
| 2. Definition. | 12. Buildings. |
| 3. Felling of timber. | 13. Remedies; parties; forms of action; |
| 10. Disturbance of the soil; mines, &c. | injunction. |

§ 1. ANOTHER injury, peculiar both in nature, in the remedy provided for it, and the penalty to which it is subject, is *Waste*. (*a*) It is an injury exclusively applicable to real property; somewhat analogous in the nature of the act to *trespass*, but not technically a trespass, because committed by a party in possession, (*b*) and sometimes consisting in more neglect or omission. The subject, as will be seen, is so extensively and variously regulated by the statutes of the several States, that the plan of the present work admits only a general view of the law relating to it. (*c*)

§ 2. Waste is defined, as "a spoil or destruction in corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail;"¹ or as the destruction of such things on the land, by a tenant for life or for years, as are not included in its temporary profits. In other words, it consists in such acts as tend to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance.² It is said, "If the tenant for life or for years should by neglect or wantonness occasion any permanent waste to the substance of the estate, whether the waste be voluntary or permissive, as by pulling down

¹ 2 Greenl. Ev. § 650; 2 Bl. Comm. 281.

² 1 Swift, 517, 518; 1 Hill. R. Pr. 260, 261.

(*a*) Known in the civil law by the term translated *dilapidation*. *Termes de la Ley* — *Waste*, 589.

(*b*) See *Proffit v. Henderson*, 29 Mis. 327. A statute, giving the reversioner or remainder-man an action of *waste or trespass*, notwithstanding any intervening estate for life or years, was held not to authorize the bringing either action at the discretion of the plaintiff, but only to give the

one action or the other, in cases, respectively, where it was the appropriate remedy; that is, waste against a tenant, and trespass against a stranger. *Livingston v. Haywood*, 11 Johns. 429.

(*c*) For a full statement of the statutory provisions, see *Hilliard on Real Property*, chap. 18. See, also, *Greene v. Cole*, 2 Saund. 252, n.

houses; suffering them to go to decay from the want of ordinary care; cutting the timber unnecessarily, opening mines, or changing one species of land into another; he becomes liable, in a suit by the person entitled to the immediate estate of inheritance, to answer in damages, as well as to have his future operations stayed."¹

§ 3. A prominent species of waste is the *felling of timber*. It is said, that it is scarcely possible to estimate the injury, which the destruction of a few valuable timber trees, by a tenant for life, on a farm with a scanty stock of wood and timber, may occasion to the owner of the inheritance. Hence bills to restrain waste of this character are not to be frowned upon by the Court.²

§ 4. In case of *lease*, creating the technical relation of landlord and tenant, express provision is not ordinarily made with reference to the timber; and it is to this class of cases that the general doctrines of waste are applicable. If, however, as is sometimes done, the timber is expressly included in a lease, the lessee may have an action of trespass against the lessor for felling the trees, and the lessor an action of waste against the lessee. And against a stranger each may have his own appropriate action. If the trees are expressly excepted, the lessor may fell them, or sue the lessee for doing it, or maintain trespass against a stranger.³ And it is to be further remarked, that, if a lease for life contains the clause, well known to the ancient law, "*absque impetitione vasti*"—*without impeachment of waste*; such clause both authorizes the tenant to cut timber, without incurring the statutory penalty, and vests the property of it in him, when cut or blown down. But if the timber is cut by a stranger, it belongs to the reversioner.⁴ But such clause does not justify *malicious* waste, destructive of the estate; such as tearing off fixtures, or cutting timber which serves for shelter or ornament of a mansion. Such injuries are sometimes termed *equitable waste*.⁵ (a)

¹ 4 Kent, 75.

² *Series v. Series*, 3 Sandf. 601.

³ 11 Rep. 48 a; *Pomfret v. Ricroft*, 1 Saun. 322, n. 5.

⁴ 4 Kent, 77; *Co. Lit.* 220 a; *Bowles'*

case, Rep. xi. 79, b. See: *Bringloe v. Goodson*, 8 Scott, 71.

⁵ *Vane v. Ld. Barnard*, 2 Vern. 738; *Downshire (Marquis of) v. Lady Sandys*, 6 Ves. Jr. 108.

(a) Although only an immediate reversioner in fee can sue for waste, yet the property in timber cut by a tenant vests in the remote reversioner. *Moore v. Wait*, 3 Wend. 104; *Bewick v. Whitfield*, 3 P.

Wms. 267; *Uvedall v. Uvedall*, 2 Rolle, Abr. 119.

So where the timber is severed by a storm. *Newcastle v. Vane*, 2 P. *Wms.* 241.

It is said, *windfalls* belong to the landlord. *Bouv. L. D. Waste*.

§ 5. In the absence of any express agreement or provision on the subject, a tenant has no right to cut down timber trees, especially if it is bad husbandry to do so, and there is no pretence of its being done for *estovers*. But he may cut *coppices* and underwoods, according to custom and at seasonable times. So the *thinnings* of fir-trees less than twenty years old belong to a tenant for life.¹ Timber trees are those used for building, and the question is one of *local usage*. But it is also waste to cut those standing in defence of a house, though not timber; or to cut trees for fuel, where there is sufficient dead wood; or to *lop* timber trees, and thereby cause them to decay; or to cut down fruit trees in an orchard or garden.²

§ 6. With reference more particularly to the felling of timber, and in consideration of the important distinction, that in England "every part of every tree will bring cash," while in this country lands are in a great measure valueless until cleared,³ the rules of the English law of waste have been much modified in the United States. It is said, in New York, the doctrine of waste, as understood in England, is not applicable to a new and unsettled country. Hence, where the whole of a farm, when leased for a rent, is in a wild and uncultivated state, with the exception of a few acres, the parties will be held to have intended, that the lessee should be at liberty to fell part of the timber in order to fit the land for cultivation. But not to destroy all the timber, and thereby irreparably injure the premises, or permanently diminish their value. And to what extent wood may lawfully be cut, must be left to the sound discretion of the jury, under the direction of the Court. But where a tenant cuts trees, not for the purpose of preparing the land for cultivation, but for the profit to be derived from a sale, he is guilty of waste. So, although a tenant for years may, from the commencement of his term, gradually clear up the woodland and prepare it for cultivation; yet he will not be permitted, just before the expiration of his lease, to cut down timber, upon that pretext. And relief is granted, in such case, upon the same principles on which an injunction is granted to stay what is called *equitable waste*.⁴ In the same State, it is

¹ Co. Lit. 53 a; *Pidgeley v. Rawling*, 2 Coll. 275; *Edge v. Pemberton*, 12 M. & W. 187.

² *Cumberland's (Countess of) case*, Moore 812; *Chandos (Duke of) v. Tal-*

bot, 2 P. Wms. 606; *Rex v. Inhabitants*, &c. 3 Burr. 1308; *Jackson v. Brownson*, 7 Johns. 234; *Dyer*, 65 a; Co. Lit. 53 a.

³ *Givens v. M'Calmont*, 4 Watts, 463.

⁴ *Kidd v. Dennison*, 6 Barb. 9.

held that chancery will not restrain a *purchaser* from cutting timber upon the land; unless he does so to such an extent, as to render the land an inadequate security for the unpaid purchase-money.¹ So, in North Carolina, a widow, to whom were assigned in dower 240 acres of land, only thirty of which were cleared, may cut down the timber on sixteen acres more, intending to clear it for the support of her family.² But, though a tenant for life of land entirely wild may clear as much of it for cultivation as a prudent owner of the fee would do, and sell the timber that grew on that part of the land; yet it is waste to cut down valuable trees for sale.³ So, in Massachusetts, it has been held not to be waste to cut oaks for fuel, on account of their abundance, and the custom of using them for this purpose.⁴ So in New Hampshire, if a tenant for life of a farm have other outlying woodland, he may take all his necessary fuel from the farm, though, when he formerly owned the farm in fee-simple, he was in the habit of taking part of his fuel from the outlying woodland. And, if the owner of a farm sell it in fee, and take back a conveyance for his life, his former practice in the manner of taking wood for fuel is not competent evidence, on the question whether he has committed waste in cutting wood and timber.⁵ So, in Ohio, timber cut to improve land belongs to the tenant for life, and not to the reversioner.⁶

§ 7. With regard to the amount of damages for the cutting of timber, it is held, that, in an account decreed against a tenant for waste of timber, he may be allowed, in mitigation, for firewood and timber furnished by him for the farm, from other premises.⁷

§ 8. Where, in an action on the case in the nature of waste, it was found that the land in question was damaged by cutting and carrying away forest trees, which were of the value of \$253.50; it was held, that this constituted a sufficient injury to sustain such action, but that the plaintiffs should recover only to the extent of the damage to their specific estate.⁸

§ 9. Although cutting and selling wood off the farm is waste, the reversioner cannot claim a forfeiture on this account, if he has assented to it either before or after the cutting.⁹

¹ Van Wyck v. Alliger, 6 Barb. 507.

² Lambeth v. Warner, 2 Jones, Eq. 165.

³ Davis v. Gilliam, 5 Ired. Eq. 308.

⁴ Padelford v. Padelford, 7 Pick. 152.

⁵ Webster v. Webster, 33 N. H. 18.

⁶ Crockett v. Crockett, 2 Ohio (N. S.),

180.

⁷ Sarles v. Sarles, 3 Sandf. Ch. 601.

⁸ Hamden v. Rice, 24 Conn. 350.

⁹ Clemence v. Steere, 1 R. L. 272.

§ 10. It is waste to dig for clay, gravel, lime, stone, &c. except for repairs or manurance. So also to open a new mine (unless in case of a lease of all mines in the land) or claypit; but not to work one already opened, or to open new pits or shafts for working the old veins; because they could not otherwise be wrought.¹ If mines are expressly included in the lease, and there are open ones, those only are embraced. But if there are no open ones, those unopened will pass.²

§ 11. Anciently, the *conversion of one kind of land into another* was waste, because it changed the course of husbandry, and tended to obscure the title. And there was held to be an implied covenant by a lessee, to use a farm in a husbandlike manner, and not to exhaust the soil by neglectful or improper tillage.³ But the old rule, in the improved state of modern agriculture, may be considered as greatly relaxed, if not wholly obsolete; unless the change in question is contrary to the ordinary course of good husbandry, or is inconsistent with common prudence or impoverishes the land. And the tenant will not be liable for an injurious change arising from any operation upon the land, which could not reasonably have been foreseen, especially if the reversioner has long delayed to make any claim therefor, and in the mean time the land has been restored to a state as good as the former one.⁴

§ 12. The removal of coarse bog-grass from a farm, which had usually been foddered on the farm, was held to be waste. So the impoverishment of fields, by constant tilling from year to year.⁵ Or suffering pastures to be overgrown with brush, where it would not be suffered by a man of ordinary prudence. But not converting meadow-land into pasture land; unless detrimental to the inheritance, or contrary to the ordinary course of good husbandry.⁶ Nor meadow or pasture into plough land, or woodland into a farm.⁷ Nor for a tenant for life of a farm, to sell hay, to be removed from the farm, conformably to the custom in the vicinity.⁸

§ 13. In relation to *buildings*, waste may be committed, either by pulling them down, or suffering them to remain uncovered,

¹ See *Irwin v. Covode*, 24 Penn. 162; *Lynn's &c.* 31 Penn. 44; *Kier v. Peterson*, 41 Penn. 361. (The last case raising some novel and curious questions concerning *petroleum*.) See also *Huntley v. Russell*, 13 Q. B. 591.

² 1 Hill. R. Pr. 265.

³ 5 T. R. 373.

⁴ 1 Swift, 517, 518; *Keepers, &c. v. Al-*

derton, 2 B. & P. 86; *Pyncheon v. Stearns*, 11 Met. 304; *Gunning v. Gunning*, 2 Show. 8; *Jackson v. Andrew*, 18 Johns. 431; *Co. Lit.* 53 b.

⁵ *Sarles v. Sarles*, 3 Sandf. Ch. 601.

⁶ *Clemence v. Steere*, 1 R. I. 272.

⁷ *Crockett v. Crockett*, 2 Ohio (N. S.), 180.

⁸ *Sarles v. Sarles*, 3 Sandf. Ch. 601.

whereby the timbers rot.¹ (a) And, as in case of land, waste may be committed by an unauthorized *change* in a building. Thus it is waste to convert a dwelling into a store or warehouse, or a parlor into a stable. Or to convert two chambers into one, or one into two; or a hand-mill into a horse-mill.² Or to pull down a house, though a new one be built, if smaller than the former.³ Or even to build a house where there was none before.⁴ Or take it down after it is built.⁵ But not to erect a new out-house, with timber from the farm, in place of one which had become ruinous.⁶ And a covenant by the lessor, that the lessee may "repair, alter, and improve," will prevent alterations in a building from constituting waste, which might otherwise be so construed.⁷ And, for an unauthorized removal of fixtures, put in by a lessee under a special agreement in writing as to his right to remove, and the lessor's right to purchase them; the lessor's remedy is by action on the agreement, and not on the covenant against waste in the lease.⁸ But the question of *injury* arising from the alteration of a building is to be left to the jury. Thus an action on the case was brought by the owner of a house, against his lessee for years, for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises. Plea, not guilty. The jury found, that the lessee did open the door without leave, but that the house was not in any respect weakened or injured by it. The Judge thereupon directed a verdict to be entered for the plaintiff, with nominal damages, subject to a case. Held, that the plaintiff was not, at all events, entitled to a verdict; but, as his reversionary interest might be injured, although the house itself was not, and that question had not been submitted to the jury, the Court ordered a new trial.⁹

§ 14. As has been already remarked, waste may be either *voluntary* or *permissive*. And permissive waste consists chiefly in suffering buildings to decay. But if they were ruinous when leased, the tenant is not bound to repair, though justified in cut-

¹ Co. Lit. 53 a and n 3.

² *Douglass v. Wiggins*, 1 Johns. Ch. 435; Co. Lit. 53 a, n. 3; 2 Rolle, Abr. 814, 815.

³ Bro. Abr. *Waste*, 93; Co. Lit. 53 a, and n. 4. See *Huntley v. Russell*, 13 Q. B. 588.

⁴ Co. Lit. 53 a.

⁵ Com. Dig. *Waste* D. 2.

⁶ *Saries v. Saries*, 3 Sandf. Ch. 601.

⁷ *Hasty v. Wheeler*, 3 Fairf. 436, 437.

⁸ *Wall v. Hinds*, 4 Gray. 256.

⁹ *Young v. Spencer*, 10 B. & C. 145.

(a) To remove fixtures unlawfully is waste. (See chap. 17.)

ting timber for that purpose.¹ Or even in cutting timber trees, and selling them to procure boards for repairs, if this course be economical and beneficial to the estate.² And it is not waste merely to violate a covenant to repair.³

§ 15. A tenant is not generally liable for waste caused by act of God or enemies; as where a house falls by reason of a tempest. But, if merely unroofed, he is bound to re-cover it before the timbers rot.⁴ And where a lessee for years covenanted, that the buildings which he should erect should, at the expiration of the term, revert to the lessor "without damages of any kind except the natural wear of the same," and a building so erected was destroyed by means of the negligent acts of a third party; held, it was a waste, for which the tenant was responsible to the lessor, and that the lessee or his assignee, in an action against the party guilty of the negligence, was entitled to recover the whole value of such building.⁵ (a)

§ 16. It is held that a court of equity will not interfere, to make a tenant for life liable in respect of permissive waste.⁶ And that an action on the case for permissive waste in buildings does not lie against a tenant by lease, who has not covenanted to repair.⁷

§ 17. It will be seen, that the law provides various remedies for the injury of waste. With reference to the parties to such remedies, the *action of waste*, which is the ancient process, lies against a tenant for life or for years, in favor of him only who has the next immediate estate of inheritance, in reversion or remainder.⁸ But a person having an expectant interest in land, less than the inheritance, cannot maintain an action for waste.⁹ Nor can one having a contingent remainder, or entitled upon a contingency to an executory devise, as having the next immediate estate of inheritance, maintain an action of waste.¹⁰

§ 18. Where the husband has possession of the wife's land, after issue born, case in the nature of waste is the proper remedy for an injury to the inheritance, by cutting timber trees, and should be in the name of the husband and wife jointly. For an injury to the crop, he must sue alone.¹¹

¹ Co. Lit. 53 a, 54 b.

² Loomis v. Wilbur, 5 Mas. 13.

³ Co. Lit. 54 b, n. 1.

⁴ 1 Hill. R. Pr. 266.

⁵ Cook v. The Champlain &c. 1 Denio, 91.

⁶ Powys v. Blagrave, 27 Eng. L. & Eq. 568.

⁷ Herne v. Bembow, 4 Taunt. 764.

⁸ 2 Greenl. Ev. § 652.

⁹ Peterson v. Clark, 15 Johns. 205.

¹⁰ Hunt v. Hunt, 37 Maine, 333.

¹¹ Williams v. Lanier, Busb. Law, 30.

(a) As to loss by fire, see Filliter v. Phippard, 11 Q. B. 347; Althorff v. Wolfe, 22 N. Y. 366; Lansing v. Stone, 37 Barb. 15.

§ 19. By two early English statutes, any tenants for life or for years are made liable for waste. Statute of Marlbridge, 52 Hen. III. c. 24, authorized the action of waste and gave full damages; and the statute of Gloucester, 6 Edw. I. ch. 5, extended the penalty to a forfeiture of the place wasted, and treble damages.¹ But by a late statute, 3 & 4 Wm. IV. ch. 27, the writ of waste is abolished. And with regard to the parties who may maintain an action, or be held liable, for waste, the statutes of the different States have made very diverse provisions, greatly modifying the English law.²

§ 20. *Tenancy for life*, to which, as well as tenancy for years, the law of waste applies, is more frequently created by *act of law* than by *act of parties*. But it has been held, that an act, restricting tenants for life from committing waste, embraces tenancies for life created by will.³

§ 21. A tenant in *dower* is ordinarily liable for the commission of waste. (a) But after a tenant in dower has *assigned* her estate, she is not liable to the assignee of the reversion for waste committed by her assignee, either in an action of waste, or in an action on the case in the nature of waste.⁴

§ 22. In general, a tenant *by the curtesy* is liable for waste.⁵ So *husband and wife* may be jointly liable.⁶ The husband of a tenant in dower, who removes a house from the premises, is liable in an action in the nature of waste, even after the death of his wife, though he may have built the house himself. But the hus-

¹ 3 Bl. Comm. 14.

² See 1 Hill. R. Pr. 269, 270.

³ Hamden v. Rico, 24 Conn. 350.

⁴ Foot v. Dickinson, 2 Met. 611.

⁵ Morgan v. Larned, 10 Met. 50; Davis v. Gilliam, 5 Ired. Eq. 308.

⁶ Bacon v. Smith, 1 Ad. & Ell. N. S. 345; Dejarnette v. Allen, 5 Gratt. 499.

(a) In Georgia, the remedy is by an action on the case in the nature of waste, for actual damages, or by injunction. The statute of Gloucester, by which the tenant in dower, in case of waste, forfeited her estate, and was liable for treble damages, has not been adopted. Parker v. Chamblis, 12 Geo. 235.

The language of the statutes referred to is as follows:—

The former provides — “Also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing

if they do, and thereof be convict, they shall yield full damage, and shall be punished by amercement grievously.”

The latter — “A man shall have a writ of waste in the chancery against him that holdeth by law of England or otherwise, for term of life or for term of years, or a woman in dower; and he which shall be attainted of waste shall lose the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at.”

It has been a matter of very serious discussion, whether the latter statute applies to permissive waste. 1 Chit. Gen. Prac. 386; 1 Saun. 323 b, n. 7 and n. k.; 2 Ib. 259, n. 11 and n. b.

band of a tenant in dower is not liable for permissive waste, after the death of his wife, and the surrender of his possession.¹

§ 23. A husband, during the life of his wife, sold timber standing on his wife's land, in lots, to different purchasers. They began cutting during her life, and continued cutting after her death. On a bill filed by her infant heir, the cutting was enjoined; and it was referred to a master to inquire and report how much of the timber had been cut after the wife's death, with a view to the question of the husband's accounting for it; and also whether the interests of the infant required that the trees still standing should be felled.²

§ 24. Although liability for waste is usually connected with *tenancy*, it is held that a tenant is responsible for waste, by whomsoever done. The reversioner looks to the tenant, and he has a claim over, in trespass, against the wrong-doer. The tenant, in this respect, is compared to a *common carrier*.³ But in equity a tenant may be joined as defendant with the party by whom the waste was actually committed. And, in a suit for waste against a tenant for life and her undertenant, on a decree for an account against both, the master may be ordered to ascertain what portion of the sum reported against the former shall be paid by the latter.⁴

§ 25. *Ecclesiastical persons*, — bishops, parsons, &c., — seized of lands *jure ecclesiæ*, though having a fee-simple qualified, are placed, in respect to waste, under the restrictions of tenants for life.⁵ But they may cut timber or dig stone for repairs of the church or parsonage.⁶ (See § 29.)

§ 26. An action on the case, in the nature of waste, lies against *the assignee* of a lessee.⁷ But an action of waste does not lie by the heir against the assignee of tenant by the curtesy, but only against the tenant himself.⁸ So an action upon the case in the nature of waste cannot be supported against the assignee of a lease, in which the lessee had covenanted from time to time, and at all times during the term when need should require, sufficiently to repair the premises, and to yield up the same so well repaired at the end of the term, in as good condition as the same should be

¹ Dozier v. Gregory, 1 Jones, 100.

² Ware v. Ware, 2 Halst. Ch. 117.

³ 4 Kent, 77; 1 Cruise, 124; White v. Wagner, 4 Har. & J. 373.

⁴ Sarles v. Sarles, 3 Sandf. Ch. 601.

⁵ Liford's case, 11 Rep. 49 a.

⁶ Ibid.; Marlborough (Duke of) v. St. John, 10 Eng. L. & Eq. 146.

⁷ Short v. Wilson, 13 Johns. 33.

⁸ Bates v. Shraeder, 1b. 260.

in when finished under the direction of J. M.; upon a breach, that the defendant suffered the premises to become and be in decay and ruinous during a large part of the term, and after the term wrongfully yielded them up, in much worse order and condition than when the same were finished under the direction of J. M.¹

§ 27. A *guardian* has in some cases been held liable for waste. But where a testator appoints a trustee of all his estate, during the infancy of his heir, such trustee is neither a guardian, so as to be liable for waste at common law, nor a tenant for life, or years, or other term, so as to be within the statutes against waste.²

§ 28. It has been held that one *tenant in common* may be liable to another for waste. The subject, however, is often regulated by statute. And it is held, that the action on the case in the nature of waste, allowed by the Revised Statutes of North Carolina, to one tenant in common against his cotenant, is confined to cases where there is a permanent injury done to the property held in common.³

§ 29. A perpetual *curate* is liable to an action on the case, at the suit of his successor, for dilapidations.⁴ But case, as for dilapidations, does not lie against the executors of a prior incumbent for mis-cultivation of the glebe.⁵ (See § 25.)

§ 30. As has been suggested, the law of waste has been greatly modified in the United States, as well with reference to *remedies*, as to the injury itself. It is said⁶ that, although the provisions of the statute of Gloucester may be considered as imported by our ancestors, with the whole body of the common and statute law then existing and applicable to our local circumstances; yet the action of *estrepement*, or waste, is in great degree superseded by *an action on the case in the nature of waste*, which lies in favor of any other reversioner, as well as the owner in fee.⁷ (a) And in New York (b) it is held, that, if a lessee cut trees which it is

¹ Jones v. Hill, 7 Taunt. 392.

² Kincaid v. Scott, 12 Johns. 368.

³ Smith v. Sharpe, Bush. Law, 91.

⁴ Mason v. Lambert, 12 Ad. & Ell. N. S. 269.

⁵ Bird v. Relfe, 1 Nev. & Man. 415.

⁶ 4 Kent, 80, 81.

⁷ 4 Kent, 81. See 1 Hill. R. Pr. 268,

795.

(a) In California, the remedy is confined to treble damages. Chipman v. Emeric, 3 Cal. 273.

An action on the case will lie, though the plaintiff purchased the estate of the particular tenant after the waste was committed.

The purchase does not imply nor tend to show, that the claim for damages was thereby settled. Dupree v. Dupree, 4 Jones, 387.

(b) By the code, §§ 450-452, the action of waste is abolished, and the remedies are

his duty, either by law or by his contract with the lessor, to preserve, he is liable to an action of waste, or case in the nature of waste; or, in the case of a contract, to an action on the contract. He is also liable in trover for the wood which has been severed from the freehold. Or in trespass, for carrying away and converting the wood, after the trees had been cut. Therefore, where a lessee for years, by a clause in the lease not amounting to an exception, agreed to leave and not to cut certain trees, which, however, he did cut and carry away during the term; held, though trespass *qu. claus.* could not be brought for the cutting of the trees, because the plaintiff was not in possession, yet the landlord might maintain trespass *de bonis asportatis* against the tenant, for carrying away the wood after it had been severed from the freehold.¹

§ 31. Case, in the nature of waste, will lie against a tenant for years after the expiration of his term, as well as covenant for the breach of covenants contained in his lease.² (See i. 26.) But an action on the case for permissive waste is not maintainable against a tenant for years, if he hold premises under an express contract or covenant to repair.³

§ 32. If a *tenant at will* commits waste, it is a determination of the will, and trespass *qu. claus.* may be maintained against him by the reversioner.⁴

§ 33. Although, as has been stated, waste is a wrong, which, even according to the terms of its legal definition, is committed by a *tenant* against the *landlord*, *reversioner*, or *owner of the inheritance*; yet a similar wrong, subject to like remedies, may sometimes be committed by and against other parties. Thus, somewhat upon this principle, where a purchaser of mills, being in possession, negligently suffers them to be burned, he is responsible to his vendor for the loss, upon a rescission of the contract, deducting the amount paid by him.⁵ So an injunction was allowed, restraining waste on a farm conveyed by the complainant to the defendant, on a bill, alleging that a deed for the farm was procured

¹ Schermerhorn v. Buell, 4 Denio, 422.

² Kinlyside v. Thornton, 2 W. Black.

1111.

³ Jones v. Hill, 1 Moore, 100.

⁴ Daniels v. Pond, 21 Pick. 367.

⁵ Cornish v. Strutton, 8 B. Mon. 586.

judgment for damages, and forfeiture, when the injury equals the value of the tenant's estate or unexpired term. And the relative value of the land, with wood on or off, the depreciation of the wood if

left standing, and the amount of woodland left on the farm, become material in determining the amount of damage. Harder v. Harder, 26 Barb. 409.

by the defendant from the complainant by undue means, the complainant being addicted to intemperance ; and praying that the deed may be declared void. And, after answer, the motion was retained to the hearing.¹

§ 34. So the injury of waste may be committed by a party in the *adverse possession* of land, more especially where a suit has been brought by the alleged true owner to eject him. And in some of the States express statutory provision has been made in reference to this kind of waste. Though it is held, that a person in possession of land under such circumstances should, until he is legally evicted, be permitted to remain in the full enjoyment thereof, to the extent that he would be, were no adverse claim set up ; subject to the restriction, that he shall not commit a permanent and lasting injury to the inheritance.² So in New York, the purchaser of land *sold on execution*, after receiving the sheriff's deed, may bring waste, or an action on the case in the nature of waste, against the defendant in the execution, for cutting timber while he remained in possession, during the fifteen months subsequent to the sale. He may also bring trover for the timber. But not replevin in the *cepit*, which lies only where trespass might be brought ; and trespass for an injury to real estate can only be sustained by a party in possession.³ But a creditor, to whom the life-interest of his debtor in land has been set off on execution, cannot, in an action of trespass against such debtor, for entering and cutting trees on the land, recover damages for trees belonging to the inheritance, the cutting of which by the creditor would be waste.⁴

§ 35. Waste is a prominent subject of chancery jurisdiction. It is said, chancery will interpose where a trespasser, in collusion with the tenant, attempts to cut timber ; or where boundaries are in dispute, and one party is about to cut ornamental or timber trees ; or where one in possession under a contract is proceeding to cut timber. So where a mere trespasser digs into a mine and works it. Or where lessees are taking from a manor, bordering on the sea, stones of peculiar value.⁵

§ 36. Although, as has been seen, only the immediate reversioner in fee can maintain the action of waste, chancery will interpose to prevent waste, upon application of the owner in

¹ *Staats v. Freeman*, 2 Halst. Ch. 490.

² *People v. Davison*, 4 Barb. 109.

³ *Rich v. Baker*, 3 Denio, 79.

⁴ *McKeen v. Gammon*, 33 Maine, 187.

⁵ 2 Story, Eq. 244, 245, § 929.

fee, notwithstanding an intermediate reversion. Or, in favor of the landlord, against a sub-tenant.¹

§ 37. In case of *privity of title*, an injunction will be granted without showing *irreparable injury*.² Though it is otherwise as between parties *claiming adversely*.³ And a landlord need not prove his title.⁴ (a) So there may be a decree of account for past waste.⁵ Or to remove a cloud on the title.⁶

§ 38. It has been held, that an injunction will not be granted, upon the allegation that the defendant is selling timber of the complainant, without an allegation of peculiar value for some special purpose.⁷ But the mere expression of a right and intention to commit waste, without any act, will be sufficient ground for an injunction, if occurring *pendente lite*.⁸

¹ 1 Hill. R. Pr. 271, 272. See *Denny v. Brunson*, 29 Penn. 382; *Dennett v. Dennett*, 43 N. H. 499.

² *George's Creek, &c. v. Detmold*, 1 Md. Ch. 371; *Hamilton v. Ely*, 4 Gill, 34. But see *Lyon v. Hunt*, 11 Ala. 295.

³ *Ibid.*

⁴ *Parker v. Raymond*, 14 Mis. 535.

⁵ *Rodgers v. Rodgers*, 11 Barb. 595.

⁶ *Lyon v. Hunt*, 11 Ala. 295.

⁷ *Hatcher v. Hampton*, 7 Geo. 49.

⁸ 1 Hill. R. Pr. 272, 273. See *ex parte Haynes*, 18 Wend. 611; *Anwyl v. Owens*, 19 Eng. L. & Eq. 610; *Green v. Keen*, 4 Md. 98; *The White, &c. v. Comegys*, 2 Cart. 469.

(a) In a bill for waste, proof of a single clear instance of waste, committed intentionally, is sufficient to entitle the plaintiff to a continuance of the injunction and to a decree for an account. *Salles v. Salles*, 3 Sandf. Ch. 601.

An account may be ordered, of waste committed by a tenant for life, and her under-tenant, in respect of timber, dilapidations, undue tillage, and withdrawing manure. *Ibid.*

Equity will interfere to prevent injury to land, even where the title is in dispute, and the right doubtful, if the waste or trespass will be attended by irreparable mischief, or if, from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain

relief at law. *Spear v. Cutter*, 5 Barb. 486.

But not to prevent the removal of timber wrongfully cut, or for an account for waste already committed; as the plaintiff has an ample remedy at law for such injury. *Ibid.*

But where the bill is filed to prevent future waste, and also to prevent the removal of timber already cut, or for an account for waste already committed, the Court, to avoid a multiplicity of suits, will allow an account and satisfaction for what has been done; and, where the mischief to the plaintiff will be irreparable, will also enjoin the defendant from removing the timber he has cut. *Ibid.*

CHAPTER XXVIII.

INJURIES TO RELATIVE RIGHTS.—PUBLIC RELATIONS.—OFFICERS OF
THE LAW.—JUDICIAL OFFICERS.

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| 1. Injuries to <i>relative rights</i> ; by and against officers of the law; judicial officers. | 11. Want of jurisdiction. |
| 4. Magistrates and Justices of the Peace; <i>judicial and ministerial duties and acts.</i> | 12. Malice, &c. |

§ 1. HAVING considered torts to *absolute* rights of persons, reputation, and property, we proceed to a view of those committed by or against parties, as *related* to others in some public or private capacity. This class of wrongs has been often incidentally referred to in the foregoing pages, but it now requires a distinct and detailed consideration.

§ 2. Among wrongs of a *public* nature (using the word *public* in the sense above explained), are chiefly those committed by or against *officers of the law*, assuming to act under color and protection of their office.

§ 3. A general and comprehensive division of officers of the law is that of *judicial* and *ministerial* officers. Judicial officers are defined as those whose duties are to decide controversies between individuals, and accusations made in the name of the public against persons charged with a violation of the law. And ministerial officers, as those whose duty it is to execute the mandates, lawfully issued, of their superiors.¹ (a) With regard to the

¹ 2 Bouv. L. D. 260. See *Home v. Mason*, 14 Iowa, 501.

(a) "Whenever the law vests in an officer or magistrate a right of judgment, and gives him a discretion to determine the facts on which such judgment is to be based, he necessarily exercises, within the limits of his jurisdiction, a judicial authority." Per Bigelow, J., *Ela v. Smith*, 5 Gray, 136.

When a duty of a judicial nature is imposed upon a public body, they are exempt from responsibility by civil action for the manner in which the duty is performed. But where a duty purely ministerial is violated, or negligently performed by a public

body or officer, an injured party may have redress by action. *Kavanagh v. Brooklyn*, 38 Barb. 232; 46 Maine, 127.

The laying out of a way by county commissioners is a judicial act, but the construction of it, and the building of a bridge, which forms part thereof, is a ministerial duty, for negligence in the performance of which, the city, or individuals undertaking its performance, will be held liable. *Stone v. Augusta*, 46 Maine, 127.

Ministerial duties of a public officer may be discharged by deputy; judicial duties cannot. *Abrams v. Ervin*, 9 Iowa, 87.

former, it is said by an ancient authority, that the law has so much respect for the certainty of judgments and authority of judges, that it will not permit any error to be assigned which impeaches them in their trust and office, and in wilful abuse of the same, but only in ignorance and mistaking either of the law or of the case and matter in fact.¹ And it is further said to be a general rule of very great antiquity, that "no action will lie against a judge of record for any matter done by him in the exercise of his judicial functions. In the imperfection of human nature, it is better that an individual should occasionally suffer a wrong than that the course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter; so also are neglect of duty and misconduct; for these I trust there is, and always will be, some due course of punishment by public prosecution."² (a) And the following extended remarks of a learned Chief Justice of Massachusetts may well be cited, as giving a recent and comprehensive view of the whole subject: "It is a principle lying at the foundation of all well-ordered jurisprudence, that every judge, whether of a higher or a lower court, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free, unbiassed convictions, uninfluenced by any apprehension of consequences. It is with a view to his qualifications for this duty, as well in regard to his firmness as to his intelligence and impartiality, that he ought to be selected by the appointing power. He is not bound, at the peril of an action for damages, or of a personal controversy, to

¹ Bac. Max. 17; *Bevard v. Hoffman*, 18 Md. 479. See *Taffe v. Downes*, 3 Moo. P. C. C. 36, n.; *Ryalls v. Reg.* 11 Q. B. 795.

² *Garnett v. Ferrand*, 6 B. & C. 611; 1 Cowp. 172.

(a) The same protection or privilege is thus still more extensively described: "An action cannot be supported against a judge, nor a justice of the peace, acting judicially, and who has not exceeded his jurisdiction, however erroneous his decision or malicious his motive, nor against a juryman, nor the attorney-general, nor a superior naval or military officer, for any act within the scope of his authority." 1 Chit. Pl. 68.

The rule has been applied to a board of pilot commissioners. *Downer v. Lent*, 6 Cal. 94.

Judges of election hold a judicial office,

and if, in the honest exercise of judgment, they reject the vote of a legal voter, he can hold them to no liability for damages or otherwise. *Bevard v. Hoffman*, 18 Md. 479.

Where it was charged that a judge connived at waste by an administrator; held, if his orders were complained of, they might be corrected by appeal or *certiorari*; if the charges related to matters not involved in his official conduct, the remedy was by suit against him personally. *Glavecke v. Tijuna*, 24 Tex. 663.

decide right, in matter either of law or fact ; but to decide according to his own convictions of right, of which his recorded judgment is the test, and must be taken to be conclusive evidence. Such, of necessity, is the nature of the trust assumed by all on whom judicial power, in greater or lesser measure, is conferred. This trust is fulfilled when he honestly decides according to the conclusions of his own mind in a given case, although there may be great conflict of evidence, great doubts of the law, and when another mind might honestly come to a different conclusion. But in a controverted case, however slight may be the preponderance in one scale, it must lead to a decision as conclusive as if the weight were all in that scale. — Now it is manifest that to every controversy there are two sides, and that a decision in favor of one must be against another. And this may extend to every interest which men hold most dear ; to property, reputation, and liberty, civil and social ; to political and religious privileges ; to all that makes life desirable, and to life itself. If an action might be brought against the judge by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case must be tried before some other judge, who, in his turn, might be held amenable to the losing party, and so on indefinitely. If it be said, that it may be conceded that the action will not lie unless in a case where a judge has acted partially or corruptly, the answer is, that the losing party may always aver that the judge has acted partially or corruptly, and may offer testimony of bystanders or others to prove it ; and these proofs are addressed to the court and jury, before whom the judge is called to defend himself, and the result is made to depend not upon his own original conviction, — the conclusion of his own mind, in the decision of the original case, — as by the theory of jurisprudence it ought to do, but upon the conclusions of other minds, under the influence of other and different considerations. — The general principle, which excepts judges from answering in a private action, as for a tort, for any judgment, given in the due course of the administration of justice, seems to be too well settled to require discussion ; and, as was said by Mr. Chief Justice Kent, in the case of *Yates v. Lansing*, (a) “ has a deep root in the common

(a) In this leading and important case, the chancellor of New York having committed one of the officers in chancery for malpractice and contempt, a judge of the Supreme Court, on *habeas corpus*, discharged him ; and he was afterwards re-committed by the chancellor for the same cause. Held, the chancellor was not liable

law." I shall, therefore, only refer to the case just mentioned, as reported in 5 Johns. 282, and 9 Johns. 395, where the authorities

to the penalty provided in the *habeas corpus* act—"no person set at large on *habeas corpus* shall be again imprisoned for the same offence, unless by the legal order or process of the court having jurisdiction of the cause."

The following elaborate and learned opinion, which was afterwards affirmed by the Court of Appeals, was given by Chief Justice Kent:

"The record before the Court presents the case of a civil suit, brought against the chancellor of this State, for an act done by him in his judicial capacity, while sitting in the Court of Chancery. The pleadings admit that the defendant did, as chancellor, and not otherwise, at a Court of Chancery, held on the 15th of September, 1808, order the plaintiff, after he had been discharged upon *habeas corpus*, by one of the judges of this Court, to be recommitted for the contempt and malpractice for which he had been originally imprisoned, and that the action is brought for such reimprisonment, and to recover the penalty mentioned in the 5th section of the *habeas corpus* act.

"The counsel who appeared for the plaintiff at the last term (and who was the same counsel that argued the case upon the *habeas corpus* at the last February term), declined to argue this case, but would not consent that judgment should pass against the plaintiff by default, and pressed the court for a decision during the term, and accompanied his motion with an intimation that he intended to carry the cause, by writ of error, into the court for the correction of errors. This fact must be my apology for bestowing more time upon the case, than the doctrine which it involves might seem to require. We have given it a deliberate attention, and in the opinion of the court, the action cannot be sustained upon any principle of law, justice, or public policy.

"The words of the statute upon which the suit is brought are, 'that no person who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence, unless by legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause; and if any person shall knowingly, contrary to this act, recommit or imprison, or cause to be recommit, or imprisoned for the same offence, any person so set at large, he shall forfeit to the party grieved, 1250 dollars.' There appear to be several strong reasons why this section in the statute cannot support the action.

"The order of the Court of Chancery was legal, inasmuch as the previous discharge of the plaintiff was not in a case authorized by the statute, and was null and void in law. This was the decision of the court at the last August term, and it will be unnecessary to review that point, or repeat what was then said. According to the judgment of the Court, there cannot be a pretext for this suit, even if the defendant was otherwise liable for an undue exercise, or misapplication, of the powers of his court.

"But the point which I purpose now principally to consider is, whether there be any foundation in law for the suit, admitting that the defendant was mistaken in supposing that the discharge of the plaintiff, under the *habeas corpus*, was unduly made. The statute allows the party so discharged to be again imprisoned for the same offence, provided it be by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause. Any court which has jurisdiction of the subject-matter, may reimprison, notwithstanding the discharge. To state a plain case: if a person committed at a court of *oyer and terminer*, or sessions of the peace, of a felony, and imprisoned in the State prison, be discharged by a judge on *habeas corpus*, on the ground that the court had no authority to commit, or that the order of commitment was invalid, would any one doubt that the court might cause the convict to be further reimprisoned either upon the same warrant, if it judged it sufficient, or by awarding a new and better one? The statute never intended such a destruction of principle, as to intrust to a judge in vacation the power to control the judgment, or check the jurisdiction of a court of record. Our system of appellate jurisdiction is built upon a sounder foundation; and instead of intrusting to the *fiat* of a single judge, to correct the errors of any court of justice, it has provided the constitutional process by appeal, or a writ of error. It is sufficient that the court which commits, has jurisdiction of the cause of commitment; and as the cause in the present case was an alleged malpractice and contempt, the Court of Chancery most undoubtedly had jurisdiction over the subject-matter. It is decisive on the point, that the court considered the act of which it complained, to be a contempt and malpractice, by being an unauthorized interference with the practice of the court. Every court judges exclusively for itself, of its own contempts; no other court,

are fully stated and reviewed. Although there was some difference of opinion in that case, it was upon the point, whether or

and much less a single judge out of court, can undertake to judge on the question. The plaintiff was recommitted, to use the language of the order, for 'contempt and malpractice;' and whether the Court of Chancery was right or wrong in considering that the plaintiff's conduct amounted to a contempt, and whether it took the proper steps to ascertain the contempt, is perfectly immaterial as to the point of jurisdiction. It had authority to punish contempts. It must judge what are contempts. Practising as solicitor without leave, and practising in another's name without his knowledge, are all misdemeanors, and contempts of the court. These are undeniable propositions.

"On the ground which the Court took, then, it certainly had jurisdiction of the subject-matter. The case of Howell, the recorder of London, is to this purpose. He presided at a court of *oyer and terminer*, and fined and imprisoned a juror, for bringing in a wrong verdict. In a suit against him for this act, the whole Court of C. B. declared that the *oyer and terminer* had jurisdiction of the cause, because it had power to punish a misdemeanor in a juror; though in the case before the court, the recorder had made an erroneous judgment in considering the act of the juror as amounting to a misdemeanor, when in fact it was no misdemeanor. (*Hamond v. Howell*, 2 Mod. 218.)

"To be prepared to give a sound construction to the statute giving the penalty in question, we ought to bear in mind the uniform and solemn language of the common law, as to the responsibility of judges, by private suit, for their judicial decisions. 'We shall never know,' says Lord Coke, 'the true reason of the interpretation of the statutes, if we know not what the law was before the making of them.' Where courts of special and limited jurisdiction exceed their powers, the whole proceeding is *coram non jure*, and all concerned in such void proceedings are held to be liable in trespass. (*Case of the Marshalsea*, 10 Co. 68. *Terry v. Huntington*, Hardres, 480.) But I believe this doctrine has never been carried so far as to justify a suit against the members of the Superior Courts of general jurisdiction for any act done by them in a judicial capacity. There is no such case or decision which I have met with, and I find the doctrine to be decidedly otherwise. In *Miller v. Seare*, (2 Black. Rep. 1141), Lord Ch. De Gray said, that the judges of the King's Superior Courts of general jurisdiction were not liable to answer per-

sonally for their errors in judgment. The protection as to them was absolute and universal; with respect to the Inferior Courts, it was only while they act within their jurisdiction. The penalty sought for in the present suit, was, I think, very clearly imposed upon individuals only, acting ministerially or extrajudicially out of court. The words of the statute do not apply to the act of a court done of record; and we ought to require a positive application of the penalty to such a case, before we can in decency presume that the statute intended so far to humble and degrade the judicial department, as to render the judges responsible in a civil suit for their judicial acts.

"The doctrine which holds a judge exempt from a civil suit or indictment for any act done, or omitted to be done by him, sitting as a judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy, and through every revolution of their government. A short view of the cases will teach us to admire the wisdom of our forefathers, and to revere a principle on which rests the independence of the administration of justice. *Juvat accelerare fontes atque haurire.*

"Sergeant Hawkins (b. 1, c. 7, p. 6) lays down this general rule, as the result of his inquiries on the subject: 'That the law has freed the judges of all courts of record from all prosecutions whatsoever, except in the parliament, for anything done by them openly in such courts as judges. For,' he adds, 'the authority of government cannot be maintained unless the greatest credit be given to those who are so highly intrusted with the administration of public justice, and that if they should be exposed to the prosecution of those whose partiality to their own causes would induce them to think themselves injured, it would be impossible for them to keep up in the people that veneration of their persons, and submission to their judgments, without which it is impossible to execute the laws with vigor and success.'

"We meet with the principle here stated as early as the Book of Assize, 27 Ed. III. pl. 18. The case there was, that A was indicted, for that being a judge of *oyer and terminer*, certain persons were indicted before him of trespass, and he had entered upon the record that they were indicted of felony, and judgment was demanded, if he should answer for falsifying the record, since he

not the order passed by the chancellor, which was the subject of complaint, was a judicial act, done within his jurisdiction; not,

was a judge by commission; and all the judges were of opinion that the presentment was void. And at this same early period we find this wise protection extended equally to grand jurors. In 21 Ed. III. Hil. pl. 16, a writ of conspiracy was sued in K. B., and the question was, whether it be a good plea to the action, that the defendants were indictors in the case complained of; and it was held to be a good plea. In 9 Hen. VI. 60, pl. 9, an action upon the case was brought against A for fraud, in executing the office of escheator, and Babington, J., said, and so it was agreed, that such a suit would not lie against a judge of record. So in 9 Ed. IV. 3, pl. 10, it was held, by Littleton, J., and not denied, that an action of assault and battery would not lie against a justice of the peace for what he did as a judge of record; and the principle was afterwards more solemnly advanced by all the judges in 21 Ed. IV. 67, pl. 49. They all concurred in opinion that for what a justice of the peace did in the sessions, he was not amenable.

"These cases and many more opinions of the like effect, which could be gleaned from the Year Books, conclusively show, that judges of all courts of record, from the highest to the lowest, and even jurors, who are judges of fact, were always exempted from prosecution, by action or indictment, for what they did in their judicial character. It did not escape the discernment of the early sages of the law, that the principle requisite to secure a free, vigorous, and independent administration of justice, applied to render jurors, as well as judges inviolable; and I fully acquiesce in the opinion of Lord Ch. J. Wilmot, that trials by jury will be buried in the same grave with the authority of the courts who are to preside over them. But I proceed to show that in subsequent periods of the English law, the doctrine was equally asserted and enforced. Staunford, in his Pleas of the Crown, which was first published in 1567, says (p. 173), that no prosecution for conspiracy lies against grand jurors, for it shall not be intended, that what they did by virtue of their oaths, was false and malicious; and that the same law applied to a justice of the peace, for he shall not be punished as a conspirator, for what he does in open sessions as a justice. In the case of Floyd and Barker (12 Co. 23), the subject underwent a solemn consideration by Lord Coke, and all the judges; and their resolution was, that no grand juror was responsible for finding an indictment, and that no judge, who tries and gives

judgment in a criminal case, or does any act in court, was to be questioned for it, either at the suit of the party, or of the king. And it was observed, 'that if the judges of the realm, who have the administration of justice, were to be drawn in question, except it be before the king himself, it would tend to the slander of justice, and those who are the most sincere would not be free from continual calumniations.'

"In *Aire v. Sedgwick* (2 Roll. Rep. 195, 197), Noy, J., laid down the same uncontradicted rule, that no action lay against a judge for anything which he did as judge. But the case of *Hamond v. Howell* (1 Mod. 184, 2 Mod. 218), deserves our particular notice, as being peculiarly weighty on the point before us. This is the case to which I have already alluded for another purpose. The defendant was recorder of London, and, as one of the judges of *oyer and terminer*, had fined and imprisoned the plaintiff, because he had brought in a verdict, as a petit juror, contrary to the direction of the court and the evidence. If ever a case was calculated to awaken sensibility, and to try the strength of the principle, this must have been one. It arose some time after the decision in *Bushell's* case, in which it was argued by all the judges, that a juror was not finable for his verdict. The act of the defendant was admitted to have been illegal, and no doubt it struck the whole court as a high-handed and arbitrary measure. The counsel for the plaintiff admitted the weight of the objection, that an action would not lie against a judge of record for what he did, *quatenus* a judge; and he endeavored to except this case from the general principle, by contending that what the defendant did was not warranted by his commission, and that, therefore, he did not act as judge. But the court did not yield to such miserable sophistry; for they held, that the bringing of the action was a greater offence than the imprisonment of the plaintiff, for it was a bold attempt both against the government and justice in general. They said that no authority or semblance of an authority, had been urged for an action against a judge of record, for doing anything as judge; that this was never before imagined, and no action would lie against a judge for a wrongful commitment, any more than for an erroneous judgment; that though the defendant acted erroneously, he acted judicially, and if what he did was corrupt, complaint might be made to the king, and if erroneous, it might be reversed.

"The case of *Groenvelt* (or *Grenville*)

whether, if it were within his jurisdiction, he could be called upon to answer for it elsewhere in a civil action. And we think, there-

v. Burnwell (or *Burwell*), (12 Mod. 386, 1 Salk. 396, 1 Ld. Raym. 454), arose long after the passing of the *habeas corpus* act, and the unanimous opinion of the Court of K. B. was given by Sir John Holt, whose name has always been held in reverence by English freemen; for he was a sound judge and an inflexible patriot, who manifested, on every occasion, a generous and distinguished zeal for the liberties of the people. He went at large into the cases in support of the doctrine, and showed to every one's entire satisfaction, that judges were not liable to an action by the party, for what they did as judges; that no averment was admissible that a judge of record had acted against his duty; that if even a justice of the peace should record that, upon his view, as a force which was no force, he could not be drawn in question, for it is a judicial act; that, in like manner, jurors were not responsible for their verdicts, because they were judges of fact; and he added in this emphatical language, 'that it would expose the justice of the nation, and no man would execute the office of judge, upon peril of being arraigned, by action or indictment, for every judgment he pronounces.' In the very modern cases of *Miller v. Seare* and others (2 Black. Rep. 1145), and of *Mostyn v. Fabrigas* (1 Cowp. 172), De Grey, Ch. J., in the one, and Lord Mansfield in the other case, explicitly and emphatically declare the same doctrine. Indeed, I am persuaded that the discussion of the question, even under this 5th section of the *habeas corpus* act, would not now be endured in any court in Westminster Hall.

"I shall close this review of the cases with noticing one arising in an American court. The case I allude to is that of *Phelps v. Sill*, lately decided in the Supreme Court of Connecticut (Day's Cases in Error, 315). From the characters composing that court, I think the decision entitled to great consideration. That was a suit against a judge of probates for omitting to take security from a guardian, and the court held, that the action would not lie. They said, that 'it was a settled principle, that a judge is not to be questioned in a civil suit for doing, or for neglecting or refusing to do, a particular official act, in the exercise of judicial power.' That a regard to this maxim was essential to the administration of justice. If, by any mistake in the exercise of his office, a judge should injure an individual, hard would be his condition if he were to be responsible for damages. The rules and principles, which

govern the exercise of judicial power, are not, in all cases, obvious; they are often complex, and appear under different aspects to different persons. No man would accept the office of judge, if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigations with every man whom his decisions might offend.'

"After this recognition of the principle, I may confidently appeal to every sound and intelligent lawyer, whether it could possibly have been the meaning of the *habeas corpus* act, to make the chancellor, or any other judge of any other court of record, responsible in a civil suit, for a heavy penalty, for an action done of record by him, while sitting in his court of justice? Ought such a sacred principle of the common law, as the one we have been considering, to be subverted, without an express declaration to that effect? Does such a construction appear ever to have been entertained in any book, or by any individual, from the time of the statute of Charles II. until the bringing of the present suit? Our act is but a transcript from the English statute, and Sergeant Hawkins (b. 2, c. 15, § 24,) expressly excludes every such construction. 'The *habeas corpus* act,' he observes, 'makes the judges liable to an action at the suit of the party, in one case only, viz., in refusing to award a *habeas corpus*, and seems to leave it to their discretion in all other cases, to pursue the directions of the act, in the same manner as they ought to execute all other laws, without making them subject to the action of the party, or to any other express penalty or forfeiture.' The penalty to which the chancellor and judges are liable, is mentioned in the fourth section of the act; and that is given against them by name, and only for their refusal, in the vacation time, to allow a writ of *habeas corpus*, when duly applied for. The chancellor and judges may refuse such a writ, at their discretion, if applied for in term time, and the penalty will not attach. It is only when they refuse, in a mere ministerial capacity, to allow a writ, that they are made responsible. The allowance of a writ in vacation, is not a judicial act. It is merely analogous to the case stated in *Green v. The Hundred of Buccleuch* (1 Leon. 323), where it was held, that an action on the case lay against a justice of the peace, for refusing to take the oath of the party robbed, because in such case he did not act as a judge, but as a particular minister appointed by the statute of Elizabeth to take examinations. The *habeas corpus*

fore, that those who dissented in this case concurred with the opinion of the Court, and with all the authorities, that where the subject-matter and the person are within the jurisdiction of the court, the judge, whether of a superior or inferior court, is justified. — These rules extend as well to a justice of the peace as to any other judicial officer, acting within his jurisdiction, in a judicial capacity.”¹

§ 3 a. Upon these grounds, it is held in an old authority, if a judge makes a mistake in anything within his jurisdiction, an action will not lie against him or his officer. Though it is otherwise, if he award process which he has no jurisdiction to award.² Thus commissioners of bankrupts are not liable to an action of trespass, for committing a person who does not answer to their satisfaction, when examined before them, touching the estate and effects of a bankrupt; the act being within their authority, though it may be done through an erroneous or mistaken judgment.³ (a)

¹ Per Shaw Ch. J., *Pratt v. Gardner*, 2 Cush. 68-70.

² *Smith v. Boucher*, Rep. t. Hardwicke (Annals), 64.

³ *Doswell v. Impey*, 1 B. & C. 163.

act does not, then, in any provisions of it, violate or even touch the principle, that no suit lies for a judicial act. Though the judge is bound under a penalty, to allow the writ, yet when the prisoner is brought before him, he is to discharge, bail, or remand him, as he shall be advised; and no action or penalty is given for what he shall then do or refuse to do.

“Judicial exercise of power is imposed upon the courts. They must decide and act according to their judgment, and therefore the law will protect them. The chancellor, in the case of the plaintiff, was bound in duty to imprison and reimprison him, if he considered his conduct as amounting to a contempt of his court. The obligations of his office left him no volition. He was as much bound to punish a contempt committed in his court, as he was bound in any other case to exercise his power. He may possibly have erred in judgment, in calling an act a contempt, which did not amount to one, and in regarding a discharge as null, when it was binding. This court may have erred in the same way; still it was but an error of judgment, for which neither the chancellor, nor the judges of this court, are or can be responsible in a civil suit. Such responsibility would be an anomaly in jurisprudence. No statute could have intended such atrocious oppression and injustice. The penalty is given only for the voluntary and wilful acts of individuals, acting in a

private or ministerial capacity. It is a mulct, and given by way of punishment. The person who forfeits it, must ‘*knowingly, contrary to the act,*’ reimprison, or cause the party to be reimprisoned. There must be the *scienter*, or intentional violation of the statute; and this can never be imputed to the judicial proceedings of a court. It would be an impeachable offence, which can never be averred or shown, but under the process of impeachment.

“No man can foresee the disastrous consequences of a precedent in favor of such a suit. Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence, and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty.

“I am therefore of opinion that judgment ought to be entered for the defendant.”

(a) But where a warrant of commitment by the court of Review, made in the matter of E, a bankrupt, after reciting that, by an order of the same court therein, on the petition of E, it was ordered that W. G. should stand committed to the Fleet, for his contempt in the said petition mentioned, and that a warrant should issue for that purpose; required the warden of the Fleet

So if an action be brought against a judge of a court in a foreign country, if under the dominion of the crown, for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a sufficient justification.¹ So the mayor of a city acts judicially, in calling out a military force to suppress a threatened riot, and, "so long as he acts within the fair scope of this authority, he is clothed with all the rights and immunities which appertain to judicial tribunals."² So where the State constitution confers the right to vote upon "white male citizens" only, and a person offering to vote is challenged on the ground of his color, the inspectors, in determining the question of qualification, act judicially and not ministerially; and therefore they are not liable in an action on the case for damages, for improperly refusing a vote, because the person offering it was partly of African descent.³ So an action upon the case was held not to lie against *the vicar-general of the bishop*, for excommunicating the plaintiff with *the greater excommunication*, for contumacy, in not taking upon him administration of an intestate's effects, to whom the plaintiff was next of kin, and intermeddling with the goods, &c.; although the citation, by which the plaintiff was cited, was void, by reason that it required him to appear and take administration, &c., without leaving him an option to renounce it, and the proceedings thereupon had been set aside upon appeal; for the vicar-general had jurisdiction over the subject-matter, namely, the granting administration, and there was no malice.⁴ So *the steward of a court baron* is a judicial officer, and trespass will not lie against him, where his bailiff by mistake took the goods of B, under a precept commanding him to take in execution the goods of A.⁵ So trespass does not lie against magistrates, acting upon a complaint made to them on oath, by the terms of which they have jurisdiction, though the facts might not have supported such com-

¹ *Mostyn v. Fabrigas*, 1 Cowp. 172.

² Per Bigelow, J., *Ela v. Smith*, 5 Gray, 135, 136.

³ *Gordon v. Farrar*, 2 Doug. (Mich.)

411.

⁴ *Ackerley v. Parkinson*, 3 M. & S. 411.

⁵ *Holroyd v. Breare*, 2 B. & Ald. 473.

to take W. G. and convey him to the Fleet, there to remain until the further order of the Court; and the previous order stated a petition to have been preferred by E, that W. G. might stand committed "for his contempt of the order in the said petition mentioned," but specified nothing further

as to the contempt: held, that the warrant and order were bad, as not containing any proper adjudication of a contempt, nor showing how the party committed might clear himself. *Green v. Elgie*, 5 Ad. & Ell. N. S. 99.

plaint; more especially if such facts were not laid before them at the time, by the party complained against, having notice of such complaint, and being properly summoned to attend.¹ Thus if a person is charged on oath before a magistrate with felony, and he issues his warrant, and the charge is substantiated, and the offender committed to prison; the magistrate is not liable for false imprisonment, although the charge turns out to be unfounded.² So an action will not lie against a justice of the peace, for issuing a writ in favor of a third person upon a false claim against the plaintiff, and secreting and destroying the writ after service thereof, and refusing to enter it, or to allow the defendant his costs. It might be otherwise, if the defendant had known, when the action was commenced, that the claim was false and unjust, or if there had been a conspiracy between the parties to injure the plaintiff, in pursuance of which the writ was sued out and issued. But the act of the defendant was a judicial act, for which an action could not be maintained. The remedy of the plaintiff was a judgment for costs against the plaintiff in the former suit; which, being provided by statute, must be held exclusive and complete.³

§ 4. As has been seen, the general principle above laid down, in relation to judicial officers, has been often applied to the class familiarly known as *magistrates* or *justices of the peace*. (a) Thus

¹ *Lowther v. Earl of Radnor*, 8 E. 113.

² *Mills v. Collett*, 3 Moo. & P. 242.

³ *Raymond v. Bolles*, 11 Cush. 315, 317.

(a) In regard to this class of officers, whose duties in the United States are of the highest importance; it has been held, that nothing can be presumed in favor of the jurisdiction of a justice of the peace. *State v. Hartwell*, 35 Maine, 129; *Lane v. Crosby*, 42 Maine, 327.

That, at common law, a justice was only a conservator of the peace. All civil jurisdiction is conferred on justices by statute. There is no presumption in law that a justice of the peace, of a foreign State, has jurisdiction to render judgment in a civil action. *Willey v. Strickland*, 8 Ind. 453.

And that the jurisdiction of magistrates can arise only from the express provision of statute, and not from the agreement of parties. *Call v. Mitchell*, 39 Maine, 465; *Williams v. Bower*, 26 Mis. 601. Which jurisdiction must be strictly pursued. *Matlock v. Strange*, 8 Ind. 57. And can never be inferred from the mere fact that a statute, by its phraseology,

implies that their jurisdiction extends to a particular case. *Hersom's case*, 39 Maine, 476.

But, on the other hand, in proceedings in cases arising before justices of the peace, much liberality is allowed in construing the acts of the parties, as well as of the justices themselves. *Mooney v. Williams*, 15 Mis. 442.

And it is also held, that the same rule of construction is extended in favor of the jurisdiction of justices of the peace, as of courts of general jurisdiction. *Wright v. Hazen*, 24 Verm. 143.

Although a justice of the peace may have removed from the county, yet, if he continues to exercise his functions, he is a justice *de facto*, and his acts will be binding on third persons, unless he removed with the absolute intent to change his place of residence. *Lexington, &c. v. McMurtry*, 6 B. Mon. 214.

And the same rule applies, where a jus-

an action for false imprisonment will not lie against a magistrate for imprisonment, in consequence of judicial acts done by him.¹ The rule, however, has been sometimes laid down in the qualified form, that trespass does not lie against a magistrate for anything done in the discharge of his duty, unless he is made acquainted with all the circumstances, necessary to enable him to determine, when called on to act. Where, therefore, the treasurer of a benefit society brought such action against a magistrate, for issuing a warrant of distress against him, upon a previous order of two magistrates for the relief of a member, in pursuance of the statute 38 Geo. III. c. 54, § 15; it was held, that the action could not be maintained; it appearing, on the face of the order, that the treasurer made no defence, the defendant's jurisdiction not having been questioned at the time, and the treasurer having neglected to present to his notice a rule of the society, which directed all disputes between its members to be referred to arbitration; and which rule was confirmed by section 16 of the statute, whereby the award was made conclusive, without being subject to the control of the magistrates.² So a justice, while acting honestly within the scope of his jurisdiction, will not be liable for issuing a mittimus on a judgment, upon which the plaintiff was imprisoned.³ So where a justice by mistake made an execution returnable in sixty instead of ninety days as required by law, whereby the plaintiff lost his debt; held he was not responsible.⁴ So an action does not lie, certainly without proof of malice, against a justice, for refusing to take bail on a charge of misdemeanor; his duty in this respect being not merely ministerial.⁵ Nor for an error of judgment, in taking a recognizance to prosecute an appeal or other recognizance in a form not authorized by law, and therefore invalid.⁶ Nor against justices of the peace, for refusing a license to keep an inn or an ale-house.⁷ So where an attachment was issued, under the provisions of a statute, on the oath of a party, by which the constable was directed to attach the goods and chat-

¹ *Bushell's case*, 1 Mod. 119; *Hamond v. Howell*, Ib. 184.

² *Pike v. Carter*, 10 Moore, 376; 3 Bing. 78.

³ *Downing v. Herrick*, 47 Maine, 462.

⁴ *Wertheimer v. Howard*, 30 Mis. 420.

⁵ *Linford v. Fitzroy*, 13 Ad. & Ell. N. S. 240.

⁶ *Chickering v. Robinson*, 3 Cush. 543; *Way v. Townsend*, 4 Allen, 114.

⁷ *Bassett v. Godschall*, 3 Wils. 121.

tice of the peace has accepted another office incompatible with that of a justice of the peace. *Commonwealth v. Kirby*, 2 Cush. 577.

tels of the defendant, his arms and accoutrements excepted; held, an action of trespass did not lie against the justice, because the constable took and detained the party's arms and accoutrements.¹

§ 4 *a*. But a justice of the peace, in making a return to a higher court upon an appeal, acts *ministerially*, and is responsible to the party injured for an error or misstatement in such return, though he be not influenced by corrupt motives.² (*a*) Or for issuing an execution within two or three hours after judgment.³ Or against the body of a debtor, knowing it to be unlawful.⁴ Or for refusing an appeal and issuing execution, if he act corruptly.⁵ So case lies against a justice of the peace, for that, after taking time to consider a case, he rendered judgment against the plaintiff, and deceitfully concealed the fact from him until it was too late to appeal.⁶ So a magistrate has no authority to order a person accused of a criminal offence, to be committed until a subsequent day for examination, without being first brought before him. Accordingly, where a justice of the peace issued a warrant, for the arrest of an individual upon a criminal charge, late on Saturday night, with an indorsement thereon, directing that the accused should be committed until the following Monday, for examination, and the constable arrested the accused on the same evening and committed him to jail without first bringing him before the justice; held, that the justice had exceeded his authority, and that he, together with the constable and his assistants, was liable in trespass.⁷ And trespass will lie against a magistrate, for committing a party, charged with felony, for re-examination, for an unreasonable time, though without any im-

¹ Collins v. Ferris, 14 Johns. 246.

² Houghton v. Swarthout, 1 Denio, 589.

³ Briggs v. Wardwell, 10 Mass. 356.

⁴ Sullivan v. Jones, 2 Gray, 570.

⁵ Tyler v. Alford, 38 Maine, 530.

⁶ Neighbour v. Trimmer, 1 Harr. (N. J.) 58.

⁷ Pratt v. Hill, 16 Barb. 303.

(*a*) "The broad line of distinction is this; that unless the duty of the magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or omitting to do anything in the execution of that duty, unless he can be fixed with malice." Linford v. Fitzroy, 13 Q. B. 240, 247; Eng. Com. L. R. vol. 66.

An action was brought against justices of the peace, for making an order for payment of a rate, after the liability to such order had expired by lapse of time under

the statute; which order was afterwards quashed. The defence was, that such limitation had not taken effect. And judgment was given for the defendants, upon the ground that this was a question which they were bound to determine as justices, and that they were not liable without proof of malice and want of reasonable and probable cause. Sommerville v. Mirehouse, 1 Best & Smith, Q. B. Eng. Com. L. R. 101.

(The judgment proceeded partly upon the ground that nothing was done to enforce the order.)

proper motive.¹ So if a justice of the peace, who has convicted a person of an assault and battery, allows him to go at large for nearly a year without payment of the fine and costs, and then issues a *mittimus*, without first issuing a *capias* for him to show cause why he should not be committed, the justice is liable in trespass.² So a justice of the peace, who issues a warrant under an unconstitutional statute, is liable to an action by the party arrested. Bigelow, J., says: "The defendant in the present case seeks to justify the tort charged in the declaration by proof that he acted as a magistrate in the performance of certain duties under Stat. 1852, c. 322, § 14. But that section of the statute has been adjudged to be unconstitutional and void. It therefore conferred no authority or jurisdiction upon magistrates. Under a government of limited and defined powers, where by the provisions of the organic law, the rights and duties of the several departments of the government are carefully distributed and restricted, if any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others."³

§ 5. As has been already explained, judicial protection extends to all judicial tribunals. The rule is laid down, that, if the judge of an *inferior court* has jurisdiction, although he may give a wrong judgment, provided the error results from the erroneous conclusion at which he arrives, neither the judge nor the plaintiff in the judgment can be made a trespasser, by virtue of enforcing the same, if the judgment remains unrescinded and unpaid.⁴ No person is liable in a civil action for what he has done as a judge, while acting within the limits of his jurisdiction.⁵ But it is to be further remarked, that, if persons having a *special* or *limited* judicial authority do any act beyond the scope of their authority, they make themselves trespassers.⁶ (See § 11.) Every such tribunal decides at its peril, and process issuing therefrom is no protection to the Court, attorney, party, or even a ministerial officer who innocently executes it.⁷ It is said, "The general rule of law, as to actions of trespass against persons having a limited authority, is plain and clear. If they do any act beyond the limit of their authority, they thereby subject themselves to an action of trespass; but if

¹ *Davis v. Capper*, 10 B. & C. 28.

² *Doggett v. Cook*, 11 Cush. 262.

³ *Kelly v. Bemis*, 4 Gray, 83.

⁴ *Deal v. Harris*, 8 Md. 40.

⁵ *Burnham v. Stevens*, 33 N. H. 247.

⁶ *Blood v. Sayre*, 17 Verm. 609.

⁷ Per Van Ness, J., *Cable v. Cooper*, 18 Johns. 157.

the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action."¹ More especially, even a judge of a court of record is answerable for an act done by his command, when he has no jurisdiction, and is not *misinformed* as to the facts on which jurisdiction depends. Thus the plaintiff, who dwelt and carried on business at Cambridge, out of the jurisdiction of the Spilsbury county Court, was sued in that court by leave of the judge, under Stat. 9 & 10 Vict. c. 95, § 60, the cause of action having arisen within the jurisdiction of the Court; and judgment was duly obtained against him. Afterwards, while the plaintiff still dwelt and carried on business at Cambridge, a judgment summons was issued by order of the judge of the Spilsbury Court, under § 98, calling upon the plaintiff to be examined as to his estate and effects, and, the plaintiff not appearing, the judge, knowing the facts, but believing, nevertheless, that he had authority, made an order that the plaintiff should be committed for his contempt. Held, the commitment was without jurisdiction, and, as the judge had ordered it under a *mistake of the law* and not of the facts, he was liable in trespass.² So an action was brought against justices of the peace for ordering the assessment of a church-rate, which was disputed, and, such proceeding being forbidden by statute, it was held that the defendants had no jurisdiction, and were liable to this action.³ So a justice of the peace, failing to associate with him another justice, and admitting to bail or committing to jail any person on a felonious charge, such power being exercisable only by two justices, so exceeds his jurisdiction, as to render void his acts in the premises, and to lay himself open to prosecution for damages at the suit of the person imprisoned or bailed.⁴ So where judgment was rendered by a justice against A and B, co-defendants, over one of whom, A, he had no jurisdiction; and execution issued thereon, in its terms leviable on the individual property of either defendant: held, the justice was liable in damages for a levy upon the property of A.⁵ (a)

(a) The execution plaintiff, who requested the issue of the execution, and participated in the proceedings under it, was also held liable. 18 Cal. 397.

¹ Per Abbott, C. J., *Doswell v. Impey*, 1 B. & C. 169; acc. *Miller v. Seare*, 2 W. Bl. 1141.

² *Houlden v. Smith*, 14 Ad. & Ell. (N. S.) 841.

³ *Pease v. Clayton*, 1 Best & Smith, 658; Eng. Com. L. Rep. 101.

⁴ *Revill v. Pottit*, 3 Met. (Ky.) 314.

⁵ *Inos v. Winspear*. 18 Cal. 397.

So the warrant of a justice of the peace, who had no jurisdiction of the matter, is void, and the magistrate and all who act under it are liable for damages.¹ So a magistrate who renders judgment for the plaintiff, and at his request issues an execution which is invalid upon its face, is liable to an action therefor.² And, in general, a justice of the peace, who acts in a case of which he has no jurisdiction, or who exceeds his jurisdiction, more especially knowing the facts which constitute the defect of jurisdiction, is liable in damages to any party injured.³ So a justice of the peace, who, in the course of the trial of a case, of which a police court has exclusive jurisdiction, or after finally disposing of a case, commits a witness to prison for contempt, is liable to an action by the witness.⁴ (a) And, upon the same principle, where persons not inhabitants of a town are not liable to be taxed for the support of common schools in that town; if a tax be levied and assessed upon the property of such non-resident, *the trustees* who issue the warrant, as well as the collector who executes it, are trespassers.⁵ So trespass will lie against a *deputy clerk* for wrongfully issuing an execution, under which the plaintiff's property was sold.⁶ So, a *commissioner in chancery* having no power to commit a witness who refuses to testify before him; if he does it, he is a trespasser.⁷

§ 6. It is laid down, as a general rule, that justices of the peace, where the forms of law are substantially complied with, though the precision proper to be observed in indictments may be wanting in complaints before them, ought not to be held liable in damages, for acts done in the performance of their official duties.⁸ But a magistrate is bound by an erroneous commitment, notwithstanding a previous regular conviction. Where, therefore, a warrant of commitment, under the Stat. 5 Geo. IV. c. 14, for fishing in a private fishery, did not state that the offence was committed in enclosed ground; held, an action for false imprisonment was

¹ Cohoon v. Speed, 2 Jones, 133.

² Noxon v. Hill, 2 Allen, 215.

³ Piper v. Pearson, 2 Gray, 120; Clarke v. May, Ib. 410; Knowles v. Davis, 2 Allen, 61.

⁴ Piper v. Pearson, 2 Gray, 120.

⁵ Suydam v. Keys, 13 Johns. 444.

⁶ Coltraine v. M'Cain, 3 Dev. 308.

⁷ Marsh v. Williams, 1 How. Miss. 132.

⁸ Alexander v. Card, 3 R. L. 145.

(a) A justice of the peace may, in good faith and to preserve order, by parol, order one into the custody of the sheriff, and to be tied, who interrupts and insults him, while officially engaged, and is otherwise behaving in a disorderly way. Furr v. Moss, 7 Jones, 525.

It is sometimes held, that a justice has

no power to commit for contempt. But where the Court erred in deciding otherwise, in an action of trespass against the justice, but admitted evidence of the circumstances of the alleged contempt; the error was held to be cured. Albright v. Lapp, 26 Penn. 99.

maintainable against the magistrate.¹ So in an action against a magistrate for false imprisonment, the plaintiff proved a commitment for a certain alleged offence. The defendant proved a conviction of the plaintiff for an offence different from that recited in the commitment. Held, this conviction was no justification of the imprisonment.² So the plaintiff appeared before the defendant, a magistrate, to answer the complaint of A for unlawfully killing his dog. The defendant advised the plaintiff to settle the matter by paying a sum of money, which the plaintiff declined. The defendant then said "he would convict the plaintiff in a penalty under the trespass act, in which case he would go to prison." The plaintiff still declined paying, and said "he would appeal." The defendant then called in a constable, and said, "take this man out, and see if they can settle the matter; and if not, bring him in again, as I must proceed to commit him under the act." The plaintiff then went out with the constable, and settled the matter by paying a sum of money. Held, an assault and false imprisonment; and, as no conviction had been drawn up, the defendant could not justify.³ But, where a justice of the peace has jurisdiction, his conviction is conclusive evidence of the facts stated therein, if no defect appear on the face of it. Therefore, in an action of trespass against two justices, for seizing and detaining a decked and registered vessel on the Thames, having gunpowder on board, under the Bum-Boat Act, 2 Geo. III. c. 28, the owner cannot be let into evidence to show that she was not a boat within the meaning of that statute⁴.

§ 7. The question of judicial privilege has been raised, in case of positive neglect or violation of official duty, and where the party complaining was himself in fault. Thus, where a party brings a *certiorari* to reverse a judgment in a justice's court, and the judgment is affirmed by default of the plaintiff in error, in not appearing when the cause is called on the calendar; he may, notwithstanding, bring an action against the justice for a false return, who cannot plead that the judgment was affirmed by the default of the plaintiff.⁵ So the question has arisen, as to the liability of a judge for excluding a party from a court-room. Thus a summary statutory proceeding, for keeping and using a gun to

¹ *Wickes v. Clutterbuck*, 10 Moore, 63.

² *Rogers v. Jones*, 3 B. & C. 409.

³ *Bridgett v. Coyney*, 1 M. & Ry. 211.

⁴ *Brittain v. Kinnaird*, 4 Moore, 50.

⁵ *Kidzie v. Sackrider*, 14 Johns. 195.

destroy game, was held to be of a judicial nature, at which all persons *prima facie* have a right to be present. Hence an action of trespass was held to lie against a magistrate, who, during such a proceeding, without any specific reason, caused the plaintiff to be removed from the room, the latter claiming a right to be present.¹ But trespass cannot be maintained against a coroner for ejecting a person from a room where he is about to take an inquisition.² And it has been recently decided, that a justice of the peace, in the progress of a trial before him, has the power to cause any person to be removed from the court-room, whose presence, in the exercise of a sound judicial discretion, he deems prejudicial to the interests of justice.³

§ 8. It has been held that an action does not lie against a person, for assuming without authority to act in a judicial capacity. Thus where A was selected by the principal in a debtor's relief bond, to act as a magistrate in an adjudication upon the debtor's disclosure, and, upon such disclosure, united with B, the other magistrate, in giving a discharge-certificate to the debtor, when in fact A had no authority to act as such magistrate; and thereby the surety in the relief-bond was compelled to pay it: held, the surety could not sustain an action against A, for wrongfully assuming to act as sub-magistrate.⁴

§ 9. A judicial officer cannot protect himself from a liability already incurred, by virtue of any illegal arrangement between the parties to the proceeding before him, in reference to the disposition of that cause. Thus a statute provided, that any person, maliciously disturbing any dissenting congregation under that act, on proof before a justice of the peace, should find sureties in £50, or in default be committed to prison till the next sessions, and on conviction forfeit £20 to the crown. To an action against magistrates for trespass and false imprisonment, they pleaded a charge preferred before them for an offence against that clause, and a commitment for want of sureties; that, before the next sessions, it was agreed between the prosecutor and the plaintiff, with the consent of the defendants, that the prosecution should be dropped, and the plaintiff discharged at the sessions for want of prosecution; and that the plaintiff was accordingly then and there so dis-

¹ Danbney v. Cooper, 10 B. & C. 237.

² Garnett v. Ferrand, 6 B. & C. 611.

³ The State v. Copp, 15 N. H. 212.

⁴ Brookings v. Cunningham, 33 Maine, 103.

charged, in full satisfaction and discharge of the assault and imprisonment. . Held, no legal satisfaction ; for either the agreement was illegal, as stifling a prosecution for a public misdemeanor, and thereby impeding the course of justice ; or the satisfaction, if any, was moving from the prosecutor only, and not from the justices, their authority being at an end after the commitment, and their consent, subsequent to the dropping of the prosecution, a mere nullity.¹

§ 10. The protection and privilege in question have been held not to excuse gross ignorance and incapacity on the part of one assuming to serve in a *quasi* judicial capacity. Thus the declaration stated, that the plaintiff, rector of F, agreed with the executrix of the late incumbent, that dilapidations should be valued, as between them, by valuers to be appointed on each side, and, in case the valuers disagreed, by an umpire to be appointed by the valuers, and that such valuation should be final and conclusive ; that the plaintiff, at the request of the defendants, employed them as valuers, for reward, to value the dilapidation on his behalf, and to use their best endeavors to procure the same to be settled at a reasonable amount as between the plaintiff and the executrix ; and the defendants accepted the employment, and entered upon it, with a valuer appointed by the executrix on her behalf. Breach, that, through the defendants, negligence, the amount of dilapidations was settled by them and the valuer, at a less sum than they ought to have been settled at, whereby the plaintiff was obliged to accept from the executrix a smaller sum than he ought to have received. The evidence was, that the defendants were employed as alleged, and had agreed with the valuer of the executrix in valuing the dilapidations at too small a sum ; having, through ignorance, valued as between incoming and outgoing tenant, instead of as between incoming and outgoing incumbent. Held, first, that the defendants were not sued as *quasi* arbitrators ; but that the cause of action was their undertaking that they were competent, and the breach of that undertaking ; and, secondly, that, although the defendants could not be expected to supply minute and accurate knowledge of the law, they ought to have known the broad distinction between the case of a tenant and that of an incumbent, and that their ignorance in that respect was a breach of their engagement.²

¹ Edgcombe v. Rodd, 5 E. 294.

² Jenkins v. Betham, 29 Eng. L. & Eq. 283.

§ 11. It is to be further remarked, as a general qualification of judicial privilege, that judicial officers are not liable to action or indictment, for acts done by them in a judicial capacity *within their jurisdiction*.¹ But, where justices or other judicial officers decide on a matter *not within their jurisdiction*, they are liable in an action. (a) And the doctrine has been broadly stated to apply, whether the want of jurisdiction applies to *place, persons, or subject-matter*.² But, in reference to this doctrine, and the case upon which it chiefly rests, it has been well remarked: "In the case of *Terry v. Huntington*, Hardr. 480, the Court seem to have been of opinion, that in an action of trespass the plaintiff might show, that the commissioners had exceeded their jurisdiction, in adjudging a subject-matter to be within their jurisdiction which was not within it, *i. e.*, in adjudging low wines to be strong wines. This, however, seems to be inconsistent with later authorities, particularly that of *Gray v. Cookson*.³ In these cases, the question, whether the subject-matter was or was not within the jurisdiction, was the very point upon which the commissioners in the one case, and the magistrate in the other, had to adjudicate; and therefore the same principle which protects a party who acts judicially, and gives effect to his judgments, until they have been reversed by proper authority, although he may have acted erroneously, extends to such cases, and to all where the question of jurisdiction arises upon matter of fact in the course of a cause, and therefore necessarily becomes the proper subject of adjudication in the cause."⁴ (See p. 189.)

§ 12. The exemption of judicial acts from liability for damages is sometimes stated with the qualification, that, if such acts are done wilfully, fraudulently, corruptly, or *maliciously*, (b) the priv-

¹ *Yates v. Lansing*, 5 Johns. 282; 9 Ib. 395; *Moor v. Ames*, 3 Caines, 170; *Brodie v. Rutledge*, 2 Bay, 69. See *Wingate v. Haywood*, 40 N. H. 437.

² *Terry v. Huntington*, Hardr. 480.

³ 16 E. 13.

⁴ 2 Stark. Ev. 809.

(a) In illustration of the respective liabilities of judges, officers, and parties (see ch. 20, § 30), it is remarked in an old and leading case: "The plaintiff has been illegally imprisoned under color of a writ sued out against him which is a mere nullity. He has been unlawfully injured, and must have a remedy; but he has none against the officer, who is not to exercise his judgment touching the validity of the process in point of law, but is obliged to obey the command of the Court, and he

may justify under the writ though it be void. (6 Rep. 54 a.) But where a court has no jurisdiction of the cause, the whole is *coram non judice* (2 Stra. 994), and trespass and false imprisonment would lie against the vice-chancellor, judge, gaoler officer, and all of them. (10 Rep. 76 a b.)" 3 Wils. 345.

(b) *Bevard v. Hoffman*, 18 Md. 479; *Morgan v. Dudley*, 18 B. Mon. 693. Thus it is held, that an action will not lie against a justice for a judicial act within his discre-

ilege does not apply. The malice, however, intended by the law in cases of this description, can hardly mean *actual* malice towards the party injured, but only that sort of implied malice which consists in, or is to be inferred from, a violation of some rule by which the proceeding should have been governed. Substantially the same principle is stated and illustrated by an approved elementary writer, as follows: "The plaintiff may rebut the evidence of a conviction or other judicial act, by evidence showing the total illegality of the proceedings, by proof that the act was not a judicial one, *inter partes*, but was wholly unwarranted, fraudulent, and void. Thus he may prove that a warrant of commitment in case of felony was granted maliciously, and without any information to support it; or in case of a distress, or commitment under a conviction, that he was never summoned, and therefore had no opportunity to make his defence."¹ So, in an action on the case, it was alleged in the declaration, that the defendant, a justice of the peace, wilfully and maliciously received a false and groundless complaint against the plaintiff, for a criminal trespass, and thereupon wilfully and maliciously issued his warrant, upon which the plaintiff was arrested and carried before the defendant for trial, and was by him wilfully and maliciously tried and convicted, without being allowed an opportunity to obtain witnesses and counsel; that, upon such conviction, the defendant maliciously sentenced the plaintiff to pay a fine of two dollars and costs, and that,

¹ 2 Stark. Ev. 807.

tion, unless he has acted from malicious, impure, and corrupt motives. *Gregory v. Brown*, 4 Bibb, 28; *State v. Campbell*, 2 Tyl. 177; *Bullitt v. Clement*, 16 B. Mon. 193.

So, that a justice acting officially, with jurisdiction and in good faith, is not answerable in trespass for his acts, although erroneous. *Hetfield v. Towsley*, 3 Iowa, 584.

A justice has been held liable to an action, for maliciously and unjustly refusing to grant an appeal. *Hardison v. Jordan*, Cam. & Nor. 454.

Where a justice of the peace maliciously grants a warrant against another without any information, upon a supposed charge of felony, the remedy against the justice is trespass for the false imprisonment, and not case. *Morgan v. Hughes*, 2 T. R. 225.

In trespass for an assault and false imprisonment, the defendant pleaded, that he was a justice of the peace, that a felony had

been committed, that there was reasonable ground for suspicion that the plaintiff was guilty of said felony, and that, in consequence thereof, he had ordered the plaintiff to be arrested. Held the plea was bad, for omitting to set out the grounds upon which the suspicion and belief of the plaintiff's guilt were founded. *Wasson v. Canfield*, 6 Blackf. 406.

In an action against a magistrate for a malicious conviction, the question is not, whether there was probable cause in fact for convicting, but whether he had any probable cause for convicting. *Burley v. Bethune*, 5 Taun. 580.

In other words, in an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to show that he was innocent; but he must also prove, from what passed before the magistrate, that there was a want of probable cause. *Burley v. Bethune*, 1 Marsh. 220.

upon his refusing to pay the same, the plaintiff was committed, by the order and warrant of the defendant, to the common jail, where he remained imprisoned for one day, until, to obtain his discharge therefrom, he was obliged to and did comply with the defendant's order to pay the fine and costs imposed upon him by the sentence. Held, on general demurrer, that the action could not be maintained.¹ Shaw, C. J., remarks: "It is alleged that the complaint was false, feigned, and groundless, and that the defendant knew it; but this was the very question to be tried, and the defendant could not judicially know it till a trial. His private knowledge could not prevent the complainant from having it tried. It is further alleged, that the defendant wilfully and maliciously tried and convicted the plaintiff, and sentenced him to pay a fine of two dollars and costs. The plaintiff alleges that he was not guilty, and that the defendant knew he was not guilty. These are facts, which the defendant is not bound to contest with the plaintiff. — It is stated that the defendant put the plaintiff on trial without allowing him an opportunity to obtain witnesses and proofs favorable to him, and also to obtain counsel. If this were so, however wrong in itself it might be, it cannot be tried here. Where the subject-matter and the person are within the jurisdiction of the justice, the question of continuance or postponement, for any purpose, is a judicial question, as much as the question whether the party on trial is guilty or not guilty."² (a)

¹ Pratt v. Gardner, 2 Cush. 63.

² Pratt v. Gardner, 2 Cush. 63, 71, 72.

(a) In reference to the mere *allegation* of malice in a case of this nature, the learned Judge speaks of "leaving out the epithets 'maliciously,' 'wilfully,' 'falsely,' with which the declaration is so thickly sprinkled, and which cannot change or qualify the material facts."

CHAPTER XXIX.

MINISTERIAL OFFICERS. — SHERIFFS, ETC. — GENERAL LIABILITIES AS TO THE SERVICE OF PROCESS.

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| <p>1. General rights and duties of ministerial officers.</p> <p>2. Jurisdiction, as affecting their liability.</p> <p>4. Burden of proof; application of the rule "in pari," &c.</p> <p>5. Justification of an officer, as depending upon the liability to seizure, of person or property.</p> <p>9. Title of an officer to property taken by him, and right of action therefor.</p> <p>10. Actions against officers; form, &c.</p> | <p>11. Notice, before service of process. Purpose and intent, as affecting an officer's liability.</p> <p>14. Return of process.</p> <p>21. Rights and liabilities of a sheriff in connection with his deputies.</p> <p>29. Justification of persons acting under an officer.</p> <p>30. Liability of parties for the acts of officers.</p> <p>34. Damages.</p> |
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§ 1. THE other general class of public officers, by or against whom a private wrong may be committed, is that of *ministerial* officers, consisting chiefly of sheriffs and other officers of the law, charged with the execution of legal process. (a) And, with regard to

(a) With regard to officers in general — though in practice the remark is oftener applied to ministerial than judicial officers — it is said, that an officer *de facto*, is one who exercises the duties of an office under color of right, by virtue of an appointment or election to that office; being distinguished, on the one hand, from a mere usurper of an office, and on the other, from an officer *de jure*. *Plymouth v. Painter*, 17 Conn. 585. See *Bates v. Dyer*, 9 Humph. 162; *Carleton v. People*, 10 Mich. 250; *Keeney v. Leas*, 14 Iowa, 464; *Curtis v. Fay*, 37 Barb. 64; *The State v. Jones*, 19 Ind. 356; *Leach v. Cassidy*, 23 Ind. 449.

Persons entering into office under color of an election, although irregular, are thereby constituted officers *de facto*, and their official acts have full force until they are removed by a writ of *quo warranto*. *Commissioners v. McDaniel*, 7 Jones, 107.

Officers properly elected, but who refuse to qualify, may be officers *de facto*, as to third parties. *Coles v. Allison*, 23 Ill. 437.

The acts of officers *de facto* are valid, when they concern the public, or the rights of third persons who have an interest in

the act done. But a different rule prevails, where the act is for the benefit of the officer, because he is not permitted to take advantage of his own wrong. *Venable v. Curd*, 2 Head, 582; *Patterson v. Miller*, 2 Met. (Ky.) 493; *Gourley v. Hankins*, 2 Clarke (Iowa), 75.

After the enactment of a law, but before the publication necessary to make it operative, a judge and clerk of the court were elected under it. Held, on *habeas corpus* from a commitment by those officers after publication, that they were then, at least, officers *de facto*, exercising a legal office under color of right, and that their right could not be inquired into on a collateral proceeding. *Boyle*, 9 Wis. 264.

In reference to an English statute, passed for the benefit and protection of officers, it is said, "The defendant acted *colore officii*, and not *virtute officii*. A constable acting *colore officii* is not protected by the statute (24 Geo. II. c. 44, § 8). Where the act committed is of such a nature, that the office gives him no authority to do it, in the doing of that act, he is not to be considered as an officer. But where a man doing an act within the limits of his official au-

mere ministerial officers, although not entitled to the peculiar protection which the law extends to those acting in a *judicial* capacity; yet the general principle is laid down, that, if a public officer errs in the discharge of his duty in good faith, he is not liable.¹ More especially, where he is required to *exercise his judgment*, or does an act as judge or a judicial act, which is within his power and jurisdiction; unless it be proved that the act alleged to be injurious was wilful and malicious.² It is said, "We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his judgment and from a sense of duty, in a matter of account with an individ-

¹ Donahoe v. Richards, 38 Maine, 376.

² Reed v. Conway, 20 Mis. 22.

thority, exercises that authority improperly or abuses the discretion placed in him, to such cases the statute extends. The distinction is, between the extent and the abuse of the authority." Per Ld. Kenyon, *Alcock v. Andrews*, 2 Esp. N. P. 542, n. See *Smith v. The State*, 19 Conn. 493.

With respect to the general responsibility of officers of the law to parties who may be injured by their neglect or violation of official duty; it is held that no action lies at the suit of an individual against an officer, for misbehavior in office, either from misfeasance or nonfeasance, unless the plaintiff can show a special damage peculiar to himself. *Butler v. Kent*, 19 Johns. 223; *Harrington v. Ward*, 9 Mass. 251.

But, whether the damage is suffered by the act or omission of a public officer, contrary to his duty, the party injured may maintain an action on the case against the officer. *Bartlett v. Crozier*, 15 Johns. 250.

Thus a sheriff is not liable to the action of a party injured by his neglect to preserve the peace; but only for his misfeasance or neglect in serving a process in which the plaintiff is interested, or for maliciously hindering or preventing the plaintiff from exercising some special right or privilege. *South v. Maryland*, 18 How. U. S. 396.

And the further distinction is laid down, that, if an officer is guilty of any act, under color of his office, directly affecting the rights of parties not named in his precept, they have a remedy against him. But if he omits the performance of any duty resulting from a precept in his hands, those alone can maintain an action against him therefor, who are parties thereto. *Moulton v. Jose*, 25 Maine, 76.

But the surety in an injunction bond may maintain an action against the sheriff, for leaving in the hands of the debtor property delivered to the sheriff by the debtor, and subsequently carried out of the State;

whereby the surety was obliged to pay the debt. *Rowe v. Williams*, 7 B. Monr. 202.

In general, an officer may justify by the express terms of his process. Thus, where an execution against two does not distinguish which is principal and which surety, the sheriff has a right to collect it from either; and the one from whom it is collected has no cause of action against the sheriff, though he claimed to be only a surety, and though the plaintiff in the execution directed the sheriff to collect it from the other. *Shufford v. Cline*, 13 Ired. 463. (See chap. 30.)

The fact, that an officer is general agent for the collection of a debt, does not absolve him from his duties and liabilities as an officer, where he obtains a judgment on a note, and the *fi. fa.* comes to his hands. *Clingman v. Barrett*, 6 Humph. 20.

An officer is liable for any oppression. So also the party for whom he acts. So an officer is liable for any abuse of trust, though no intentional wrong is proved against him. *Cantrine v. Clark*, 41 Barb. 629.

"If a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer." Per Best, C. J., *Henly v. Mayor, &c.* 5 Bing. 107.

Gross negligence in the discharge of a fiduciary duty is evidence of fraud and misbehavior in office. *Commonwealth v. Rodes*, 6 B. Mon. 171.

An habitual neglect to account for small sums by a public officer authorizes and requires the presumption, that the sums retained and not accounted for were retained for sinister and selfish purposes; and a gross and unscrupulous negligence in the keeping of his accounts, instead of rebutting such presumption, strengthens and supports it. *Commonwealth v. Rodes*, 6 B. Mon. 171.

ual, has been held liable to an action for an error of judgment."¹ And the same protection has been extended to an immediate officer of a court, and acting in execution of an order of such court. Thus, in an action on the case against an officer of the Insolvent Debtor's Court, for improperly drawing up an order for the discharge of an insolvent, instead of his further imprisonment, the declaration alleged, that such officer wrongfully, falsely, and unlawfully made and issued a certain order, purporting to be an order from the Court. Held, on general demurrer, that, as it was throughout the declaration averred as purporting to be, and treated as an order, and had not been repudiated or rescinded by the Court itself; the action could not be maintained by a creditor of the insolvent against the officer, for the discharge of the insolvent under such order.²

§ 2. In relation to that class of ministerial officers, whose authority is most frequently questioned, viz.: sheriffs and other officers, acting under the writs, warrants, or other precepts of courts and magistrates; the rule already stated in relation to judicial officers (chap. 28) is equally applicable, that, where a court has *jurisdiction* of the subject-matter, the officer is not bound to examine into the validity of its proceedings or the regularity of its process; and is not liable, certainly without proof of express malice.³ But *want of jurisdiction* in the Court deprives the officer of the benefit of the process under which he seeks to justify himself. (a) Thus a warrant, issued by a justice of the peace without authority, affords no justification to the officer executing it.⁴ Hence, where the law does not authorize a justice of the peace to receive a complaint and issue a warrant on the Lord's day, for a violation of the law merely by travelling; an arrest made on the Lord's day, by virtue of a warrant so issued, is illegal, and the officer making it is a trespasser.⁵ So an execution, issued by a magistrate against a

¹ Per Taney, C. J., *Kendall v. Stokes*, 3 How. 97.

² *Whitelegg v. Richards*, 6 Moo. 501.

³ *Warner v. Shed*, 10 Johns. 138; *Dynes v. Hoover*, 20 How. U. S. 65; *Woods v. Davis*, 34 N. H. 328. See *Gray v. Kim-*

ball, 42 Maine, 299; *Mason v. Vance*, 1 Sneed, 178; *Ortman v. Greenman*, 4 Mich. 291.

⁴ *Stephens v. Wilkins*, 6 Barr, 260; *Hall v. Blaisdell*, 1 Scam. 332.

⁵ *Pearce v. Atwood*, 13 Mass. 324.

(a) It is held, that, where an officer acts under process in the discharge of his ministerial duty, and does not exceed his authority, he will be protected though the process is not sufficient; but where he acts officiously and as a volunteer, he must himself show that the process was legal and

sufficient. *Hunt v. Ballew*, 9 B. Mon. 390.

Upon a motion to discharge, notwithstanding the return of an officer, evidence is admissible, that, under pretence of a writ, he brought property from another county into his own, and there levied upon it. *Pomroy v. Parmlee*, 9 Iowa, 140.

person who has not been summoned before him, is void, and the constable who levies such execution is a trespasser.¹ So where a justice notifies a constable, that an appeal has been entered, and execution in his hands superseded, any subsequent sale under the execution is void, and the constable is a trespasser. The regularity of the appeal is the justice's business and not the constable's.² And, in general, where a court of competent jurisdiction issues a *supersedeas* to an execution in the hands of a sheriff, he need look no farther, but is bound to obey it; it is not for him to inquire of the propriety of granting the *fiat*.³ (a) So an officer will be protected in the execution of legal process, more especially issuing from a court of general jurisdiction, if it appears upon the face of the process that the subject-matter is within the jurisdiction of the court.⁴ So an officer is protected in the execution of process issued by a justice of the peace, which shows upon its face that the justice had jurisdiction of the subject-matter, if nothing appears to apprise him that the justice had not jurisdiction of the person. And the still more favorable rule has been adopted, that the process protects the officer, even though issued by a justice of the peace, unless it appears on its face that it was issued by a court not having jurisdiction of the person, or unless he had notice in some other way that the process was issued without authority of law.⁵ And it has even been held sufficient justification, if a process is regular and legal on its face, though the officer has

¹ Tobin v. Addison, 2 Strobb. 3.

² O'Donnell v. Mullin, 27 Penn. 199.

³ Williams v. Stewart, 12 S. & M. 533.

⁴ Camp v. Moseley, 2 Florida, 171; Smith v. Miles, 1 Hemp. 34.

⁵ McDonald v. Wilkie, 13 Ill. 22; Barnes v. Barber, 1 Gilm. 401; Parker v. Smith, Ib. 411; Tefft v. Ashbaugh, 13 Ill. 602; Whipple v. Kent, 2 Gray, 410; Churchill

v. Churchill, 12 Verm. 661. See Miller v. Grice, 1 Rich. 147; State v. Crow, 6 Eng. 642; Higdon v. Conway, 12 Mis. 295; Camp v. Moseley, 2 Florida, 171; Decker v. Bryant, 7 Barb. 182; Holmes v. Nuncaster, 12 Johns. 395; Yates v. St. John, 12 Wend. 74; Harget v. Blackshear, Tayl. 107; Damon v. Bryant, 2 Pick. 411; Campbell v. Webb, 11 Md. 471.

(a) The distinction is made, that a warrant, fair on its face, and showing jurisdiction in the person issuing it, will protect the officer acting under it, as against the person named in the warrant; but where the rights of third persons are affected by the execution of the warrant, the preliminary proceedings establishing jurisdiction must be shown. Decker v. Bryant, 7 Barb. 182.

It is to be observed, that, in general, the right of an officer to serve a process is the measure of his liability for neglecting to serve it. Thus a sheriff, who receives an execution in favor of a private corporation, of which he is a member, is not liable for

neglecting to levy and return it; although he served the original writ, by attaching property, and took a receipt for the property, and had prosecuted a suit against the receptor to final judgment, which was unsatisfied by reason of the insolvency of the receptor. Bank, &c. v. Parsons, 21 Verm. 199.

But a sheriff, having an execution running against the body of a party not liable to arrest, is not a trespasser for arresting him. And, on the other hand, the sheriff is not liable, in such case, for not making the arrest. State v. Hamilton, 9 Mis. 784.

knowledge of facts rendering it void for want of jurisdiction.¹ Thus a constable, who, pursuant to the unauthorized orders of a justice of the peace, arrests a witness and takes him before the justice to answer for a contempt, and commits him to prison, is not liable to an action, unless the justice's want of authority appears on the face of the *capias* or *mittimus*.² So, although the interest of a justice of the peace in a penalty, though ever so minute, takes away his jurisdiction of an offence, it is said to be not certain, that the officer who serves the process in such a case may not be protected against a suit for damages.³ So, if a justice of the peace, having been legally qualified to act as such, continues to act in the same capacity after accepting an incompatible office, he will be considered as a justice of the peace *de facto*, so far as third persons are concerned, and his warrant will justify the officer to whom it is directed in making service thereof.⁴ So if the writs of attachment, under which the sheriff justifies, are regular on their face, he is not bound to go beyond them, and show affidavits and bonds, or that there was a subsisting debt, on which they might properly issue.⁵ And an officer is bound to serve an execution or other process regular on its face, and issued by a court having jurisdiction, though there be irregularity or error in the proceedings.⁶ So it is held, that an action does not lie against a sheriff or his officer, for having arrested a certificated bankrupt, a discharged insolvent debtor, a peer, a party to a cause, or a witness *eundo vel redeundo*.⁷ Nor, it seems, for seizing under an execution *privileged articles*, such as arms for muster; at all events unless done with a knowledge that they are privileged.⁸ So an officer, who holds an execution in the common form, issued by a court having jurisdiction, against a defendant who had been discharged under an insolvent law, after the judgment was rendered, is not liable to an action of trespass, for arresting and committing such defendant, although the defendant shows his discharge to

¹ *The People v. Warren*, 5 Hill, 440. See *Sprague v. Birchard*, 1 Wis. 457; *Buf-fandeau v. Edmondson*, 17 Cal. 436; *Billings v. Russell*, 23 Penn. 189.

² *Gray*, 410.

³ *Pearce v. Atwood*, 13 Mass. 324.

⁴ *Commonwealth v. Kirby*, 2 Cush. 577.

⁵ *Kirksey v. Dubose*, 19 Ala. 43.

⁶ *French v. Willet*, 4 Bosw. 649; *Cady v. Quinn*, 6 Ired. 191. See 8 B. Mon. 109.

⁷ *Tarleton v. Fisher*, 2 Doug. 671-677; *Woods v. Davis*, 34 N. H. 328.

⁸ *The State v. Morgan*, 3 Ired. 186.

Thus, in an action for failing to execute an affidavit which authorized such process as *capias*, it is no defence that there was no *Spence v. Tuggle*, 10 Ala. 538.

the officer before he is arrested.¹ So an officer holding an execution issued by a court of competent jurisdiction is not liable, though the judgment has been paid;² nor is he bound to investigate the genuineness or sufficiency of a receipt shown to him by the debtor in settlement of the judgment.³ Nor is it an excuse for a sheriff's failing to levy an execution upon a judgment, that the consideration of the judgment had failed.⁴ So an action will not lie against an officer who arrests *Jonathan A. Trull* on an execution against *George A. Trull*, the former being the real defendant, and having been served with the original process, by the same erroneous name, but having suffered judgment by default.⁵ Nor for serving an execution, issued on a judgment rendered against a person described as being of A, when in fact he dwelt in B. The mistake in the addition of place should have been taken advantage of in abatement in the original action.⁶ (a) Though if an execution issue against an aggregate corporation by the name of "The President, Directors, and Company," &c., with directions to the officer for want of estate to take their bodies, the officer cannot arrest a member of the company by virtue of such execution.⁷ (b) Nor is a sheriff liable for executing, or justified in refusing to execute, a writ issued under the judgment of a court having jurisdiction of the person and subject-matter, although *the judgment be erroneous*.⁸ (c) Nor for serving a warrant, issued in

¹ *Wilmarth v. Burt*, 7 Met. 257.

² *Mason v. Vance*, 1 Sneed, 178.

³ *Twitchell v. Shaw*, 10 Cush. 46.

⁴ *Arnold v. Commonwealth*, 8 B. Mon. 109.

⁵ *Trull v. Howland*, 10 Cush. 109.

⁶ *Smith v. Bowker*, 1 Mass. 76.

⁷ *Nichols v. Thomas*, 4 Mass. 232. See *Sanders v. Dowell*, 7 S. & M. 206.

⁸ *Milburn v. Gilman*, 11 Mis. 64; *Suydam v. Keys*, 13 Johns. 444. See *Griswold v. Chandler*, 22 Tex. 637; *Hammond v. The People*, 32 Ill. 446.

(a) It was formerly held, that the sheriff cannot justify the arrest of the real defendant or the taking of his goods, where his name is mistaken in the writ. *Shadgett v. Clipson*, 8 E. 328; *Cole v. Hindson*, 6 T. R. 234; *Scandover v. Warne*, 2 Camp. 270.

So it has been held, that, where a defendant is arrested by a wrong Christian name, and the sheriff returns, "I have taken, &c., sued by the name of," &c. he is a trespasser. *Rex v. Sheriff, &c.*, 1 Marsh. 75. Otherwise, if the party has admitted the name to be the true one, previous to the issuing of process. *Price v. Harwood*, 3 Camp. 108.

(b) In New York, it has been held, that a *capias ad respondendum*, in a plea of tres-

pass, generally, without indicating the character of the trespass, will not authorize the sheriff to hold the defendant to bail. *Patterson v. Parker*, 2 Hill, 598.

It is held, that, if a debtor is committed on a writ of execution, where it ought to have been levied on property, his remedy is by an action against the officer; the commitment is not thereby rendered void. *Warner v. Stockwell*, 9 Verm. 9.

(c) An officer is liable for levying an execution upon "an impossible judgment." As where the execution was signed by the magistrate as "trial justice," when no such office existed. *Palmer v. Crosby*, 11 Gray, 46.

The irregularity of an execution, issued after a year from the judgment, will be

legal form, by a court having jurisdiction, and directing him to arrest a party; though the proceedings of the Court in issuing the warrant may have been erroneous.¹ The distinction is taken, that process upon an *erroneous* judgment will justify the party and the officer; upon an *irregular* judgment, the officer only.² (a) Thus the sheriff made a levy on property, to which a claim was inter-

¹ Donahoe v. Shed, 8 Met. 326.

² Philips v. Biron, 1 Strange, 509; Billings v. Russell, 23 Penn. 189.

waived by slight acts of the debtor. Ellison v. Wilson, 36 Verm. 60.

A sheriff, executing a *fi. fu.* after notice of the allowance of a writ of error or *superseatas*, is liable in trespass, though there has been no further *superseatas* of the execution. And notice to the sheriff is notice to his officers, and renders them liable in trespass for proceeding with the execution. Belshaw v. Marshall, 4 B. & Ad. 336.

But the notice must be actual and not constructive merely. Morrison v. Wright, 7 Port. 67.

But this privilege does not extend to a third person assisting the sheriff; as he acts voluntarily, and therefore does it at his peril. Ibid.

(a) Upon this ground, an action does not lie against the sheriff, for the neglect of his deputy in the service of an execution, issued by a justice of the peace in the plaintiff's favor, upon a recognizance taken in pursuance of the statute of Massachusetts, of 1782, c. 21, by which the plaintiff lost his debt; where the execution misrecited the recognizance, both as to the sum in the recognizance, and as to the time of entering into it. Albee v. Ward, 8 Mass. 79.

In an action of trespass against an overseer of highways, he cannot justify by showing an order from the commissioners to open a road, unless it be shown to have been legally laid out. Guptail v. Teft, 16 Ill. 365.

An officer cannot seize property without an execution for that purpose; nor the property of third persons. Yarborough v. Harper, 25 Miss. 112.

Process cannot lawfully be served after the return day. And where an officer takes property on an execution which has expired, the defendants may retake it, if they can do so without a breach of the peace. Finn v. Commonwealth, 6 Barr. 460; Lofland v. Jefferson, 4 Harring. 303.

A writ of attachment, not returned to court, constitutes, after the time limited by law for its return, no justification of an officer, who has attached and removed property under it. By the omission of such return, the officer becomes a trespasser *ab*

initio. And the duty of the officer to make such return, and its necessity to his justification, are the same, although he discovers, after the attachment, that the writ was issued and placed in his hands for service without authority from the plaintiff, who repudiates the proceeding, and although he immediately on such discovery returns the property to the owner. And the officer, in such circumstances, is liable for the actual damage caused by the trespass. It is the duty of an officer, in such circumstances, on discovering that the writ was issued without authority, to restore the property to the owner, and make a true return of the facts. Williams v. Ives, 25 Conn. 568. See Frellsen v. Anderson, 14 La. An. 65.

A debtor may maintain an action against the officer for the property levied upon, after payment of the judgment. Dorman v. Kane, 5 Allen, 38.

In such case, a sale on the execution is void. Laval v. Rowley, 17 Ind. 36.

A writ or civil process does not, of itself, authorize the officer to execute it on Sunday, or on the fourth day of July; and if executed on either of those days, the return of the officer must show, that the affidavit required by the statute was made and delivered to him. Swinney v. Johnson, 18 Ark. 534.

A delivery of possession under a writ, of *hab. fac.* furnishes no justification to a previous invasion of the land. Smith v. Guild, 34 Maine, 443.

A constable, having a warrant to search for certain specific goods, alleged to have been stolen, found and took away those goods, and certain others, also, supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge. Held, he was liable to an action of trespass. Crozier v. Cundey, 6 B. & C. 232.

When a sheriff is sued in trespass, he must prove that he was sheriff. And if written authority is given by the sheriff to make a levy, testimony should be introduced to prove such special authority. Calvert v. Stone, 10 B. Mon. 152.

posed, and upon the trial the plaintiff in execution was nonsuited, and the property directed to be restored to the claimant; which judgment was afterwards reversed by the Supreme Court, and the sheriff was afterwards proceeded against by motion for failing to make the money. Held, that he was protected by the judgment of the Court, though erroneous, in delivering up the property.¹ More especially, where a precept is lawful on the face of it, and in all its forms, the officer is protected, although it may be voidable for irregularity or mistake;² until set aside or reversed.³ Thus, where process is issued out of one court, with the seal of another attached to it, such process is erroneous, and is the same as if it had no seal; but the defect is amendable; and the process is not absolutely void, but voidable only, and is a good protection to the officer.⁴ So a writ, which has once been legally served, and then altered, by inserting a different date and return day, without the consent of the defendant therein; is not thereby rendered void, so as to excuse the officer, who served it originally, from again making service of it, when delivered to him for that purpose, subsequent to the alteration.⁵ So an execution in the name of "A. B., use of officers of court," is not void, but gives protection to the officer levying it, if issued by a court of competent jurisdiction. The words "use of officers of court" may be treated as surplusage.⁶ So a constable, in trespass for making an attachment, may give in evidence the process on which he made the attachment, notwithstanding the direction of the writ is not in the form prescribed by an existing statute, but is according to a former statute. And such process, if duly returned by him, will justify the taking, though the suit be pending in court at the time of the trial of the action of trespass.⁷

§ 3. In further explanation of the protection or privilege dependent upon *jurisdiction* (see p. 184), it is held, that, where the *subject-matter* of the suit is not within the jurisdiction of a court, all the proceedings are absolutely void, and the officer, as well as the party, is a trespasser. But where the subject-matter is within their jurisdiction, and the want of jurisdiction is as to

¹ Smith v. Leavitts, 10 Ala. 92.

² The State v. McNally, 34 Maine, 210; Stewart v. Ray, 4 Ired. 269; Wilton, &c. v. Butler, 34 Maine, 431; Parker v. Smith 1 Gilm. 411.

³ Keniston v. Little, 10 Fost. 318. See Banta v. Reynolds, 3 B. Mon. 80; Cogburn

v. Spence, 15 Ala. 549; Averett v. Thompson, 15 Ala. 678.

⁴ Dominick v. Eacker, 3 Barb. 17.

⁵ Stoddard v. Tarbell, 20 Verm. 321.

⁶ McElhaney v. Flynn, 23 Ala. 819.

⁷ Stewart v. Martin, 16 Verm. 397.

person or place, the officer is excused, unless the want of jurisdiction appears on the process.¹ It is said, "Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously. The magistrate, acting without any jurisdiction at all, is liable as a trespasser in many cases; but this liability does not extend to the constable who acts under a warrant; and the statute 24 Geo. II. c. 44, was passed with this very object of protecting such officers."² (a)

§ 4. With regard to the general liability of an officer for the execution of process committed to him, it is held, that for any breach of duty at least nominal damages will be given.³ But there must be some affirmative evidence of neglect of duty; more especially of the officer's knowledge or means of knowledge of facts, which would have enabled him to make service, had he used due diligence.⁴ Where the evidence as to the exercise of care is evenly balanced, the presumption is that he has done his duty.⁵ Though, it is said, slight evidence will be sufficient to change the burden of proof in this respect.⁶ (b) And in some cases the plain-

¹ *Smith v. Shaw*, 12 Johns. 257; *Cham-paign, &c. v. Smith*, 7 Ohio, N. S. 42.

² Per *Ld. Abinger*, *West v. Smallwood*, 3 M. & W. 420.

³ *Barker v. Green*, 2 Bing. 317.

⁴ *Beckford v. Montague*, 2 Esp. 475; *West v. Cooper*, 18 Ind. 1.

⁵ 47 Maine, 320.

⁶ 2 Greenl. Ev. § 584.

(a) It was held, in an old case, that in trespass and false imprisonment, for taking a man in execution on a judgment in an inferior court, the plaint and process are sufficient to justify the officer, although there was no cause of action arising within the jurisdiction of the court. *Squibb v. Hole*, 2 Mod. 29; acc. *Higginson v. Martin*, *Ib.* 195; *Crowder v. Goodwin*, *Ib.* 58.

(b) In serving a writ, an officer will be presumed to have discharged his duty, and where a party, who resists the officer, relies on the fact, that he omitted to declare the authority under which he acted, it is proper matter of defence, and need not be set forth in the indictment. *State v. Freeman*, 8 Clarke (Iowa), 428.

In an action against an officer for not safely keeping goods attached, instructions to the jury, that, where the officer has

taken the goods into his custody, and has not stated in his return on the execution that they were taken from him without his fault, the burden is on him to show that he exercised ordinary care in keeping them, and he must satisfy the jury that they were lost without his fault; are not sufficiently favorable to him. *Mill v. Gilbreth*, 47 Maine, 320.

The more reasonable rule in such a case is, that, if the officer proves the loss of the goods, and the attendant circumstances, the burden of proof is then upon the creditor to show negligence. *Ib.*

In such a case, theft is not presumptive evidence of a want of ordinary care. *Ib.*

In an action against the sheriff, for not levying on goods within his bailiwick, and for a false return, it was held, that, though the execution debtor had other goods, which the sheriff had not seized or

tiff must show, affirmatively, the nature of the claim which it was the object of the process to enforce. Thus, in an action for not serving a writ of mesne process, the plaintiff must prove a cause of action in the former suit.¹ (a)

¹ Alexander v. Macauley, 4 T. R. 611; Riggs v. Thatcher, 1 Greenl. 68; Gunter v. Cleyton, 2 Lev. 85.

not sold, the proper estimate of the damages was what the goods would have realized, if sold for the best price which the sheriff could have obtained. Mullett v. Challis, 2 Eng. L. & Eq. 260.

Where a sheriff is sued for a neglect of duty, it is no defence for him to show that the debtor, even after being imprisoned on a *ca. sa.*, may pay other *bonâ fide* debts, to the disappointment of the judgment creditor. The true inquiry is, has the creditor been deprived of any legal means of recovering his debt; and, if he has, the sheriff is liable for such neglect. Sherrill v. Shurford, 10 Ired. 200.

In an action against a sheriff, to try title to goods alleged to be wrongfully attached by him, an instruction, that, if the defendant levied on the property and held it by virtue of his office, as sheriff, the verdict must be for the defendant, was held erroneous, under any conceivable state of facts. Miller v. Bryan, 3 Clarke (Iowa), 58.

A declaration against the sheriff alleged, that, although the defendant could have levied of goods of the debtor within his bailiwick the moneys indorsed on the writ, yet the defendant, disregarding his duty, did not levy of the said goods the moneys or any part thereof; and that the defendant, further disregarding his duty, falsely returned, &c. Held, the first allegation sufficiently charged a breach of duty, and applied to improper conduct of the sheriff in the sale of the goods, as well as to negligence in omitting to levy; and that the declaration was good without stating special damage. Mullett v. Challis, 2 Eng. L. & Eq. 260.

A sheriff, who neglects to sell property under a *fi. fa.*, before the return day of the writ, is *primâ facie* liable for so much of the debt as equals in value the property levied upon. But, if the *fi. fa.* be placed in the sheriff's hands without the *bonâ fide* intention of selling the property; or if the plaintiff, after the levy has been made, enter into negotiation with the defendant, whereupon the proceedings are interrupted and the debt lost: the sheriff is not liable. Dorrance v. The Commonwealth, 13 Penn. 160. (See § 4 a.)

In an action against a sheriff for refusing to levy on a particular lot of land, a plea that the land was subject to mortgage, and therefore the levy would be valueless, is

insufficient. Lawson v. The State, 5 Eng. 28.

In determining the sufficiency of a levy, the sheriff must exercise his own discretion and judgment, and, if he fails to levy on what a reasonable man would deem sufficient, if within his power, he will be liable to the plaintiff in execution for the deficiency, as he will to the defendant for an unreasonable excess. But, if the levy be originally sufficient, he will not be liable in case of a deficiency or excess, by reason of depreciation or advance in the value of the property. *Ibid.* (See chap. 30.)

(a) What constitutes due diligence on the part of the sheriff, is a mixed question of law and fact. Whitsett v. Slater, 23 Ala. 626. See Hearn v. Parker, 7 Jones, 150, (where a delay of eight days was held to make the officer liable); Jenkins v. Troutman, 7 Jones, 169; Whitney v. Butterfield, 13 Cal. 335.

A sheriff, on receiving a *fi. fa.*, is bound to levy on property sufficient to satisfy it, without delay. Lawson v. The State, 5 Eng. 28.

If the sheriff lets the property levied on go out of his hands, not in due course of law, he is responsible, if the debt be lost. Sanford v. Boring, 12 Cal. 539.

Where a statute requires all instructions to the sheriff to be in writing, a verbal order from the plaintiff will not discharge him. *Ibid.*

When the sheriff is ruled for failing to make the money on an execution, evidence that the defendant in execution "was in possession of a house and lot, as of his own property, prior to the day on which the execution came to the sheriff's hands, claiming ownership thereof, and continued in possession until after the return day of the execution," is admissible evidence for the plaintiff. Whitsett v. Slater, 23 Ala. 626.

A sheriff is not liable for failing to make the money on an execution, if the defendant, during the time the execution was in the sheriff's hands, had no property in his possession, unless it be shown that he was the owner of property which could have been levied on, and of which the sheriff had notice; but if the defendant during such time was in the possession of property, and the sheriff, without resorting to the

§ 4 *a*. And the general rule (see chap. 4) applies to this class of cases, that an action will not lie in favor of a plaintiff who has been himself in fault. (See p. 191.) It is held that a sheriff will not be amerced, where the interference of the plaintiff has prevented him from discharging his duty.¹ Thus a sheriff is not liable for an insufficient return, if attributable to the plaintiff's instruction or interference, or a statement of facts made to the sheriff by the agent of the plaintiff.² So a plaintiff who was present at an execution sale, and did not object to the publicly stated terms of it, cannot, in the absence of fraud or collusion on the part of the sheriff, have a rule against the sheriff, because he announced improper terms of sale.³ So where a plaintiff makes a mistake in the amount of his claim, in his petition, affidavit, and writ, and the sheriff who makes the attachment releases the property on the defendant's paying to him the amount in the writ, and costs; though the plaintiff afterwards recover judgment for a larger amount, he has no cause of action against the officer.⁴ So in an action by the defendant in an execution against the sheriff, for not having entered a sale of his land in the sheriff's books to A, which sale A refused to comply with, so that a resale was made at a less price to B; the sheriff may show in defence, that the price bid by A was in consequence of the fraudulent misrepresentations of the execution defendant respecting his title.⁵

§ 4 *b*. But the mere appointment of a deputy, on the nomination of the creditor, to execute a *fi. fa.*, does not discharge the sheriff from liability for the wrongful act of the deputy (as in failing to levy and sell under an execution), unless there be collusion or want of good faith in making the nomination.⁶ And where an

¹ *Stryker v. Merceles*, 4 Zab. 542. See *Koger v. Donnell*, 1 Head, 377.

² *Billingsly v. Rankin*, 2 Swan, 82; *Robinson v. Harrison*, 7 Humph. 189.

³ *Bottoms v. Mithvin*, 26 Geo. 481.

⁴ *Page v. Belt*, 17 Mis. 263.

⁵ *Ford v. Godbold*, 2 Strobb. 109.

⁶ *Martin v. Martin*, 2 Jones, 285.

steps necessary to protect himself from liability, returns the execution unsatisfied, he assumes the burden of showing that the property was not subject to the execution, and, unless he does so, must be held liable to the plaintiff. *The Governor v. Campbell*, 17 Ala. 566.

Where a sheriff had levied on the property of a defendant in execution, and neglected to advertise and sell it for nearly six months, not having time to do so before the next term of the court, and, just before the sitting of the court, an

injunction was obtained by the defendant, restraining the plaintiff from collecting his *fi. fa.*; held, the sheriff was liable notwithstanding the injunction. *Neal v. Price*, 11 Geo. 297.

Where a sheriff has charge of a slave arrested on warrant for larceny, and, through want of ordinary and honest diligence on his part, such slave meets with injury or death, the sheriff will be liable for the injury to the master. *Tudor v. Lewis*, 3 Met. (Ky.) 378.

execution creditor instructs a deputy sheriff to sell on credit, but he does not act in conformity with the instruction, this does not make such deputy the agent of the creditor, so as to discharge the sheriff from liability to such creditor for the wrongful acts of the deputy, in other particulars, in reference to the sale.¹ So where on the plaintiff's *fi. fa.* was indorsed a stay of "sales only," and the plaintiff's attorney informed the sheriff that the stay was intended to apply only to the sale, and instructed him to levy immediately; held, the sheriff was liable to the plaintiff for neglecting to levy.² So an agreement by the creditor with the officer to postpone an execution sale, after levy of an execution issued by a justice of the peace, does not absolve an officer from his duty to return the execution.³ So a release by the plaintiff of his own property, or property claimed by a third person, taken with property of the defendant on an execution, does not discharge the sheriff's liability for not making money from the defendant's property.⁴ Nor is it a defence to an action against a sheriff, for not levying and returning an execution, that it had been agreed between the plaintiff and the debtor, that the balance due upon the execution should be charged to the debtor upon the books of the plaintiff, and should be adjusted with their other book account, and that this agreement was mutually understood to be in discharge of all other liabilities and remedies; without evidence that the amount had been actually paid or adjusted, by a settlement of the current account embracing it.⁵ So an omission, by a party for whom the sheriff is acting, to interfere with him in the discharge of his duties, or to object to or complain of the manner in which he performs them, is no such evidence of assent to his neglect or violation of duty, as can properly be submitted to the jury.⁶ So where property had been attached, judgment obtained, and execution issued, and placed in the hands of an officer for service; and, upon the officer's suggesting a doubt whether the property belonged to the debtor, the creditor directed him to inquire before levying, and afterwards the creditor gave to the officer a sufficient bond of indemnity, and directed him to sell the property, and also to levy upon another article of property, which had not been attached: held, this afforded no evidence that the creditor had

¹ *Sheldon v. Payne*, 3 Seld. 453.² *Farrar v. Wingate*, 4 Rich. 35.³ *Clingman v. Barrett*, 6 Humph. 20.⁴ *Poe v. Dorrah*, 20 Ala. 288.⁵ *Nye v. Kellam*, 19 Verm. 548.⁶ *Moore v. Westervelt*, 2 Duer. 59.

controlled the execution, so as to exonerate the officer from liability for neglecting to levy it.¹ So the owner of goods exempt from execution, who has subjected them to a mortgage payable on demand, by the terms of which he remains in possession until default, can maintain an action against the sheriff who seizes them under a *fi. fa.* in favor of another creditor. And, as between the plaintiff and the sheriff, the property will be treated at its full value.² (a)

§ 5. With regard to the further justification of an officer in the service of process, depending upon the *liability* of the party, or the property of the party, upon whom such service is made; it is the general rule, that, if an officer, in the execution of process, goes beyond its mandate, and takes property from the possession of a stranger, he can only defend himself by showing a better title in himself, or in him for whom he acts.³ Nor will any title pass to goods of A, sold on an execution against B.⁴ And trespass may be maintained against a sheriff, by a party whose goods he has seized in an attachment against another, for the illegal taking and detention; although in the attachment case he had come in, and filed his claim to the property, and recovered judgment for its restitution.⁵ But the distinction is made, even in regard to property of the execution debtor himself, that an *officer* may justify the seizure of property by alleging and showing a *fi. fa.* from the proper tribunal, but the *plaintiff* in such execution must show the judgment on which it issued.⁶ (b) So where a plaintiff claims

¹ Chase v. Plymouth, 20 Verm. 469.

² Livor v. Orser, 5 Duer, 501.

³ Perkins v. Thornburgh, 10 Cal. 189; Lyon v. Goree, 15 Ala. 360; Crosby v. Baker, 6 Allen, 295.

⁴ Chambers v. Lewis, 28 N. Y. (1 Tiff.) 454; Harris v. Murray, Ib. 574.

⁵ Trieber v. Blocher, 10 Md. 14.

⁶ Clay v. Caperton, 1 Monr. 10; Dixon v. Watkins, 4 Eng. 139; Burton v. Sweaney, 4 Mis. 1. See Dobbs v. Justices, &c. 17 Geo. 624.

(a) An officer may also, by his own act, preclude himself from setting up a defence which under other circumstances might be made. Thus, where payment of the amount collected by a deputy on an execution is demanded of the deputy by an agent of the creditor, and he promises to pay the amount at a future time; in an action against the sheriff for the money, it cannot be objected, that no evidence was shown of the authority of the agent. Barron v. Pettes, 18 Verm. 185.

So where a statute requires a sheriff, on going out of office, to turn over processes his hands to his successor by indenture

and schedule; if such successor or his deputy receive them without this formality, he is liable for their proper execution. Matthis v. Pollard, 3 Kelly, 1.

(b) But a party who seeks to justify the taking of property, under legal process, must show that he was an officer, and had lawful authority to take the property. Thus, in an action of trespass, the proof was, that the defendant admitted that he had levied on the property, at the same time exhibiting the execution and stating whom it was against; and, when asked whether he would disclaim the levy, he refused to do so. Held, sufficient to charge him as a tres-

under a previous purchase from the defendant in the execution, the officer may show that such purchase was fraudulent as to creditors, and, in so doing, may, and is in general required to show the judgment under which the execution was issued.¹ But an officer is not bound to take the money of a third person, though offered by the debtor.² And he may justify neglect to serve an execution, by showing title in a third person;³ or that the judgment is fraudulent, and that he holds another process in favor of another judgment creditor.⁴ (a) Or that goods to be attached did not belong to the debtor.⁵ Or prior attachments, sufficient to cover the whole value of the goods.⁶ So, in case of insolvency, goods attached, but previously mortgaged, must be delivered to the mortgagee, not the assignee.⁷ But where a sheriff,

¹ *Rinchev v. Stryker*, 31 N. Y. (4 Tiff.) 648; *Stephens v. Frazier*, 2 B. Mon. 250. See *High v. Wilson*, 2 Johns. 46; *Paige v. O'Neal*, 12 Cal. 483; *Erisbee v. Langworthy*, 11 Wis. 375.

² *Carey v. Tinsley*, 22 Tex. 383.

³ *Dobbs v. Justices, &c.* 17 Geo. 624.

⁴ *Pierce v. Jackson*, 6 Mass. 242; *Clark*

v. Foxcroft, 6 Greenl. 296. See *Adams v. Balch*, 5 Greenl. 188; *Wilson v. Sparks*, 9 Tex. 621.

⁵ *Canada v. Southwick*, 16 Pick. 556.

⁶ *Commercial Bank v. Wilkins*, 9 Greenl. 28.

⁷ *Howe v. Bartlett*, 8 Allen, 20.

passer, and that the admission involved no justification under the process. *Copley v. Rose*, 2 Comst. 115.

So declarations of a defendant, in an action of trespass for the removal of personal property, made during the removal, that he was acting under an execution against the owner, are no proof of that fact. To make such execution a justification, it must be set up in the pleadings and legally proved at the trial. *Schultz v. Frank*, 1 Wis. 352.

So, in an action of trespass, the plaintiff called one of the defendants, who testified to the taking, and that it was done by virtue of a road-warrant. Held, that this statement made no justification, for it did not show that the warrant was in due and legal form, but the warrant itself should have been produced. *Mericle v. Mulks*, 1 Wis. 366.

So a justification in trespass, under a judgment and execution of A, a justice, requires proof that A is a justice. *Hunter v. Harris*, 4 Blackf. 126.

But the officer is not required to show a sale of the property taken. *Burton v. Sweaney*, 4 Mis. 1.

When an execution comes to the hands of a sheriff after the expiration of his term of office, if he levies on and sells the defendant's property by virtue of it, he is liable in trover or trespass. So although

the defendant, not knowing that fact, being present at the sale, did not ask a postponement. *Andreas v. Broughton*, 21 Ala. 200.

So a constable cannot levy upon property after the return day of the writ; and, if he does so, he is a trespasser. But if a levy has been duly made before, the property may be taken away after, the return day. *West v. Shockley*, 4 Harring. 287.

(a) If the sheriff sets up the defence that the goods in his hands were applied to a prior execution, the plaintiff may show that such execution was fraudulent, and the sheriff notified not to pay over the money to the creditor therein. *Warmoll v. Young*, 5 B. & C. 660. And the same answer may be made to the defence of a transfer by the debtor himself. *Dewey v. Sir A. Bayntun*, 6 E. 257.

The rule which requires an officer levying on property, in justifying against strangers, to show a valid judgment, as well as execution, does not apply, where voluntary assignees of the defendant in execution, who became such after the levy, are the claimants. In such case, the production of the execution is sufficient. *Heath v. Westervelt*, 2 Sandf. 110.

Where the debtor was in possession, the owner must make a demand before suit. *Killey v. Scannell*, 12 Cal. 78.

under color of legal process; and actual possession of the plaintiff is not necessary, but only a right of possession.¹ But for mere neglect or *nonfeasance*, as in other like cases, trespass on the case is the proper remedy. (a) And trespass on the case, for any mere *nonfeasance* of a deputy, will not lie against the sheriff.²

§ 11. The necessity of *notice*, in order to enable an officer to justify under legal process, is sometimes brought in question.

§ 12. In an action for assault and battery, committed on an officer by one whom he was attempting to arrest on a warrant, the defendant set up, by way of rejoinder, that the plaintiff, at the time, &c., did not acquaint or give notice to the defendant that a warrant had been issued, or that he had any warrant, or process, &c., nor did the defendant know that any warrant had been issued, or that the plaintiff had any warrant or process; to which the officer surrejoined, that he did acquaint and give notice to the defendant that a warrant had been issued, &c., concluding to the country. The issue having been found for the defendant, held, not a case for a judgment *non obstante veredicto*, and that he was entitled to judgment, though several other issues were found against him.³ (b)

§ 18. But it has been sometimes held, that the officer, having authority, need not at the time claim to act under his precept or any other authority.⁴ (c) Thus, in trespass for breaking and

¹ Codman v. Freeman, 3 Cush. 306.

² Abbott v. Kimball, 19 Verm. 551.

³ Bellows v. Shannon, 2 Hill, 86. See State v. Phinney, 42 Maine, 384.

⁴ State v. Elrod, 6 Ired. 250.

(a) See *Trespass, Case*. If the real ownership of a judgment and execution is in a different party from the creditor of record, and the officer neglects to pay over the money collected; the action against him may be brought in the name of either; and, generally, the rule of damages is the same in either case. Bradley v. Chamberlain, 31 Verm. 468.

(b) An indictment, for assaulting and obstructing an officer in the discharge of his duties, as such, averred that the defendant made an assault upon the officer, and, while the latter was in the due and lawful execution of his office, did "unlawfully, knowingly, and designedly" hinder and oppose him, &c. Held, a sufficient allegation, that the defendant knew that he was an officer. Commonwealth v. Kirby, 2 Cush. 577.

Also, if it were otherwise, that this is not a ground for arresting the judgment, but

only for sentencing the defendant for the simple assault. Ibid; 42 Maine, 384.

(c) With regard to a claim against an officer for positive wrong or malice in connection with an official act; if a surety in a debtor's bond, before the condition had expired, applied to the officer for information as to its date, and the officer stated to him a time later than its true one; the surety cannot maintain an action against the officer in consequence of such erroneous statement, unless he knew it to have been false, or made it with an intention to deceive. Moulton v. Jose, 25 Maine, 76.

But, in an action against the sheriff for causing, by his wrongful representations, property seized by him under legal process to be sold for less than its value, it is not necessary to aver that the representations were made *maliciously*. An averment that they were made falsely and fraudulently is sufficient. Griffin v. Isbell, 17 Ala. 184.

entering the plaintiff's close and taking his goods, the defendant may justify under a sufficient legal process, if he had it in fact at the time, though he declared then that he entered for another cause.¹ So where a defendant was in prison under an invalid process, and the sheriff, without telling his deputy, the jailer, that he had in his own hands a valid process, ordered him to retain the prisoner; held, in an action for false imprisonment, that the possession of a valid process by the sheriff was a good defence for the acts of his deputy, though the latter was ignorant of the fact.² But, in trespass for breaking and entering the plaintiff's ship, and seizing and converting his goods, the defendants justified under a writ of *feri facias*, to which the plaintiff replied *de injuriâ suâ propriâ absque residuo causæ*, and new assigned, that the defendants entered the ship and took the goods for other purposes than those mentioned in the plea. Held, that it was competent to the Judge to leave it to the jury to say, whether the goods were *bonâ fide* taken under the writ, or whether the execution was resorted to as a color for taking them, and not to effect a levy by virtue of the writ.³

§ 14. Questions often arise, involving the duty and liability of officers in relation to the *return* of legal process. (a)

§ 15. It is held in an old case, that a justification under a returnable process is ill, without showing a return of it. And, if the plaintiff in the action join with the officer in the plea, there must be judgment against both.⁴ (b) The distinction is made,

¹ Crowther v. Ramsbottom, 7 T. R. 634.

² Meeds v. Carver, 8 Ired. 298.

³ Lucas v. Nockells, 1 Moo. & P. 783.

⁴ Middleton v. Price, 2 Stra. 1184; Henry v. Tilson, 19 Verm. 447. See Walker

v. Davis, 3 H. & N. 374; State v. Latham, 6 Jones, 233; Polley v. Lenox, &c. 4 Allen, 329; Funk v. Hough, 29 Ill. 145; Miller v. Mills, Ib. 431; Smith v. Tooke, 20 Tex. 750; Foster v. Dryfus, 16 Ind. 158.

(a) In regard to the mode of *proving* a return or the want of it, it is held, that the question whether a writ of attachment was ever returned, being a fact which cannot be determined by inspection of the record, is a question for the jury. Parks v. Hall, 2 Pick. 206; Hinman v. Brees, 13 Johns. 529.

(b) A sheriff is not liable to an action merely for omitting to return an execution till after the return day. Commonwealth v. Magee, 8 Barr. 240.

It is not the duty of a sheriff to return process to any one but the clerk or his deputies. Casky v. Haviland, 13 Ala. 314.

But it is not a defence to a suit against

an officer, for neglecting to return a process to the proper term of the court, that he had tendered it to the clerk, who had refused to receive it; nor that the clerk had died during the term. Hamlin v. March, 9 Ired. 35.

Although, if a sheriff makes a false return on a writ, the party injured has his remedy by suit; the sheriff cannot be compelled to amend his return, and return a particular state of facts. Humphries v. Lawson, 2 Eng. 341.

Where executions are by law returnable to the term next their issuing, unless the plaintiff otherwise order; if, by mistake, one is made returnable to a day in vacation

however, that, in order to justify under *final process*, the sheriff is not required to show its return. Otherwise, in case of *mesne process*, which is merely the foundation of further proceedings.¹ But a *bailiff* may justify under a process, without showing a return; he not having the control of the process. So the *party* in whose favor it issued; except where he joins with the sheriff in a plea of justification.²

§ 16. An officer is liable for a *false return*; and this whether it be positively or negatively false. Thus an action on the case will lie, for suppressing material facts in the return to a *mandamus*.³ So for a return false in substance, though true in words.⁴ Or though made false through ignorance or mistake.⁵ But not where the return is not false in fact, but only draws an incorrect legal inference from facts which are truly stated.⁶ So an action lies, although, after the return of *nulla bona*, the creditor brought another action and recovered a new judgment.⁷ (a)

¹ Rowland v. Veale, 1 Cowp. 18; Freeman v. Blewitt, 1 Salk. 410; Brown v. Bissett, 1 Zab. 46; Hoe's case, 5 Co. 90; Doillie v. Jolliffe, Lane, 50; Cheasley v. Barnes, 10 E. 73; Britton v. Cole, 1 Salk. 408; Oystead v. Shed, 12 Mass. 511. See Parker v. Pattee, 4 N. H. 530.

² 2 Phill. Ev. (4th Amer. ed.) 366.

³ The King v. Lyme Regis, 1 Doug. 158, 159.

⁴ Ibid.

⁵ Houser v. Hampton, 7 Ired. 333; Clark v. Gary, 11 Ala. 98.

⁶ Lemit v. Mooring, 8 Ired. 312.

⁷ Pitcher v. King, 9 Ad. & Ell. 288.

later than the next succeeding term, the officer is yet bound to make return to such term; and, for failure to make such return, he is liable for the full amount of the debt. Milburn v. The State, 11 Mis. 188.

In an action against a sheriff for a false return upon a writ of replevin, if the defendant do not plead the general issue, nor any special plea denying that the original suit was well founded; it is admitted to have been so. The State v. Youmans, 1 Cart. 217.

But, in an action against a sheriff for a false return upon a *fi. fa.*, the plaintiff must show that the judgment upon which it issued was a valid one. McDonald v. Bunn, 3 Denio, 45.

In an action against a sheriff for neglecting to return a *fi. fa.*, where there is no averment that the debtor had real estate, and there is evidence that there was not sufficient personal property, the plaintiff cannot show that the debtor had real estate. Stevens v. Rowe, 3 Denio, 327.

A sheriff may defend a motion against him for failing to make due return of an execution, by proving that the execution was not supported by a judgment. But it will not avail him to show that the execution was returned the day after the day ap-

pointed, and quashed for some defect in itself alone. Shute v. McRae, 9 Ala. 931.

A sheriff cannot justify an attachment under a writ which it was his duty to return, without showing such return, although it was not returnable before this action was commenced. Williams v. Bab-bitt, 14 Gray, 141.

A mistake of a date in a return may be corrected at any time. Ritter v. Scannel, 11 Cal. 238. See Johnson v. Stone, 40 N. H. 197; Conkling v. Parker, 10 Ohio, N. S. 28; Farmington v. Somersworth, 44 N. H. 589; Watter v. Palmer, 18 Ind. 279.

In Tennessee, motion, and not the notice that it will be made, is the commencement of suit; and the sheriff may amend his return upon a summons at any time before motion, even after service of notice. Hill v. Hinton, 2 Head, 124.

Where the sheriff levies on property under an attachment, but omits to make a return of the levy, he may afterwards be permitted to make the return *nunc pro tunc*; and, upon such return being made, the rights of the attaching creditor will be the same as if it had been made at the proper time. Bancroft v. Sinclair, 12 Rich. 617.

(a) It is held, in an old case, that an ac-

§ 17. It is held that an officer is liable to an action, for neglecting to return an execution according to the precept thereof, although the judgment creditor suffers no injury by such neglect.¹ And, in an action against a sheriff, for not returning an execution, where the defendant had real estate within his precinct, the measure of damages is the amount of the judgment, with interest.² So if a sheriff, having final process in his hands against the body of a debtor, has an opportunity to arrest him, and neglects to do so, and afterwards, within the life of the execution, the debtor absconds, and the sheriff thereupon makes a return of *non est inventus* upon the execution; he is liable for the amount of the execution and interest, though the debtor was insolvent.³

§ 17 a. But, on the other hand, it has been held, that, in an action for false return, the defendant may offer evidence of the real damage thereby caused to the plaintiff. And no action is maintainable, without averment of special damage, against the sheriff, for a false return to a writ of *fi. fa.*, where, necessarily, no damage could result to the creditor; the goods in question having vested in the assignees of the debtor, who had become bankrupt.⁴ So, in regard to the *mode* of return, the sheriff may return an execution *by mail*.⁵ And to an action for failing to return an execution within thirty days from return-day, it is a good defence, that he has lost or mislaid it, or has mailed it to the office whence it issued; and that, after diligent search, he cannot find it; though this must be proved by evidence, like any other matter in avoidance.⁶ So where a sheriff misplaced an execution, and failed to return it within thirty days after return-day; but it was replevied by good parties: in an action against the sheriff, he was held not to be liable.⁷ So it is a good

¹ Goodnow v. Willard, 5 Met. 517.

² The People v. Lott, 21 Barb. 130.

³ Goodrich v. Starr, 18 Verm. 227.

⁴ Wylie v. Birch, 3 Gale & Dav. 629; acc. Nash v. Whitney, 39 Maine, 341.

⁵ Cockerham v. Baker 7 Jones, 288.

⁶ Mitcheson v. Foster, 8 Met. (Ky.) 324.

⁷ Shippen v. Curry, 3 Met. (Ky.) 184.

tion on the case will not lie against a sheriff, for returning *cepi corpus et paratum habeo*, although the party arrested do not appear. Page v. Tulse, 2 Mod. 83.

No action lies against the sheriff, for a false return of *nulla bona* by his bailiff, to a writ of *fi. fa.* issued out of his county court, although the defendant had notice of the goods, and the return was made with his privity and by his direction. Pitcher v. King, 9 Ad. & Ell. 288.

By a false return, the officer may not only subject himself to an action, but also

preclude himself from maintaining an action in reference to property seized by him. Thus an officer, who had taken property on an execution, untruly returned, that further service was suspended on account of a former attachment. He afterwards took a receipt for the property, to be redelivered on demand, or within thirty days from the rendition of judgment in the first suit. Held, that no action could be maintained on this receipt. Stanley v. Drinkwater, 43 Maine, 468.

defence to an action for failing to return an execution, that the levy or the judgment was fraudulent and void ; provided, in the latter case, the sheriff hold the process of another creditor against the judgment debtor.¹ So it is a good defence to an action for false return, that the plaintiff, with full notice of the facts, assented to such return.² So, a justice of the peace issued a notification, that a debtor committed on execution intended to take the poor debtor's oath at a certain time, and an officer returned, that he had served a copy on the creditor, whereas, by the supposed copy, a different time was fixed. At the time appointed in the original notification, the debtor took the oath, in the absence of the creditor, and was discharged. In an action by the creditor against the officer for a false return ; held, the officer might give in evidence, in mitigation of damages, that the debtor had no attachable or visible property ; and if this, in connection with the other evidence in the case, should satisfy the jury that the debtor was entitled to take the oath, the plaintiff ought to recover only nominal damages.³ So, where a summons was issued from a justice's court against A, which the constable, by mistake, served upon B, and returned the summons *personally served*, and judgment was rendered against A, for a penalty alleged to have been incurred by a violation of a statute ; in an action brought by A against the constable for a false return, the defendant may show in mitigation of damages, that A had actually been guilty of the offence for which judgment was rendered against him ; for, as the defendant acted in good faith, the plaintiff ought not to recover more than his actual damages, and having alleged, in his declaration, that by the false return he was prevented from making a defence, when he had a good and substantial one on the merits, the evidence in question is a proper answer to this averment.⁴ And a sheriff is not liable for an insufficient return, if attributable to a statement made to him by the agent of the plaintiff.⁵ Nor for a mere false expression of opinion as to his return. Thus a deputy sheriff, who had returned a *fi. fa.*, was inquired of, some months afterward, by the plaintiff, whether the return was in due form of law, and the deputy, intending to deceive, answered that it was ; where-

¹ Bradley v. Wyndham, 1 Wils. 44 ; v. Clifton, 10 Ad. & Ell. 673 ; Smallcomb v. Foxcroft, 6 Greenl. 296. v. Cross, 1 Ld. Raym. 251.

² Stuart v. Whittaker, 2 C. & P. 100. ³ Woods v. Varnum, 21 Pick. 165.

See Beynon v. Garraat, 1 Ib. 154 ; Holmes

⁴ Green v. Ferguson, 14 Johns. 389.

⁵ 2 Swan, 82.

upon the plaintiff filed a creditor's bill against the execution defendant, but lost the advantage thereof by insufficiency of the return. Held, an action for deceit would not lie against the deputy, inasmuch as the inquiry made of him related merely to his opinion upon a question of law; and, even if the inquiry had been specifically directed to the words of the return, and the deputy had answered falsely, the action could not have been maintained; for the plaintiff had the means of attaining correct information completely within his reach, without resorting to the deputy.¹ (a) So, where neither the body nor property of a debtor is within the reach of a sheriff holding an execution, and he neglects to return the execution to the proper office within its life, with his return of *non est inventus*; he is liable to the creditor only for actual damages.²

§ 18. In general, a return must be true *at the time*.³ But a return is not false, although the act returned was not fully completed at the time at which it is stated to have been done. Thus an execution was delivered to an officer, with directions to levy it on real estate; and the officer, without entering on the land, immediately made a memorandum on a separate paper (noting the day and hour) that he then took the land in execution. He afterwards caused the land to be set off, and dated his return as of the above day and hour. Held, the return was not false, and the levy took effect, by relation, from that time.⁴ (b)

¹ Per Bronson, J., *Start v. Bennett*, 5 Hill, 303.

² *Kidder v. Barker*, 18 Verm. 454.

³ *Bowen v. Parkhurst*, 24 Ill. 257.

⁴ *Hall v. Crocker*, 3 Met. 245.

(a) But an officer, who has, under a writ of replevin, entered on land and taken property, in order to justify, must make his return on such writ; and, if he does not return, and the plaintiff is instrumental in preventing such return, the plaintiff cannot justify under it, unless the defendant assented thereto. This rule does not apply, however, to those who acted by the authority of the officer under the writ. *Allen v. Feland*, 10 B. Mon. 306.

The punishment imposed on a sheriff, under the (Texas) statutes, for not returning a writ, is for a contempt of court, if his misconduct amounts to a contempt, and in all cases he is liable for damages resulting from his non-performance. *Crow v. State*, 24 Tex. 12.

A failure to return a process is only *prima facie* a contempt. *Ibid*.

By § 3603 of the (Tennessee) Code, a penalty of \$125 is recoverable by motion of the party aggrieved against any officer who fails to execute and make return of any process issued from any court of record, and delivered to him twenty days before the return day. This means that he shall not only hand in the writ, but return that he has executed it, or state a sufficient reason why he has not done so. *Hill v. Hinton*, 2 Head, 124.

The return "not to be found in my county," would be more perfect and proper, but great strictness is not required when a motion is made for a penalty. Hence the return, "not found," although informal, is sufficient. *Ibid*.

(b) Where a sheriff indorsed truly the day on which he received a declaration in ejectment, returnable to a county court,

§ 19. The return of an officer, while, as between third persons, (a) conclusive evidence of the facts stated in it, is also at least *prima facie* evidence in favor of the officer himself; (b) and, except in an action for false return, has been held not open to contradiction by other evidence. Thus when an officer, in his return of the levy of an execution, states that he delivered to A, the agent of the execution creditor, seizin and possession of the premises levied on; such creditor, in an action against the officer for a defective levy, cannot give evidence that A was not his agent.¹ So where an officer returns on a warrant, directing him to search the buildings of S for certain described stolen goods, "by virtue of this warrant, having made diligent search, and found three pieces of goods in the house of the within-named S, and arrested the body of the within-named S, and have him," &c.; this return is *prima facie* evidence, at least, that the officer had found three pieces of the goods described, and justifies him in arresting S, and carrying him with the goods before a magistrate.²

§ 19 a. In general, however, in an action against a sheriff, his return may be contradicted by the plaintiff, even though he were a party to the process on which the return was made.³ Thus where a sheriff defended his return, on the ground that the debtor was servant of an ambassador; it was held that the plaintiff might show the appointment to that office to have been colorable and

¹ *Bates v. Willard*, 10 Met. 62. See *Bruce v. Holden*, 21 Pick. 187; *Townsend v. Olin*, 5 Wend. 207; *Gardner v. Hosmer*, 6 Mass. 325; *Shewel v. Fell*, 3 Yea. 17; *Lewis v. Blair*, 1 N. H. 68; *Fuller v. Holden*, 4 Mass. 498; *Castner v. Symonds*, 1 Min. 427; *Tullis v. Brawley*, 3 Min.

277; *M'Donald v. Loewright*, 31 Mis. 29; *Folsom v. Carli*, 5 Min. 333; *Kingsbury v. Buchanan*, 11 Iowa, 387; *Owens v. Ranstead*, 22 Ill. 161; *McGough v. Wellington*, 6 Allen, 505.

² *Stone v. Dana*, 5 Met. 98.

³ *Barrett v. Copeland*, 18 Verm. 67.

and returned on the same "too late to hand," although five days intervened between the day indorsed and the return-day; it was held, that he was not liable under (North Carolina) Rev. Code, c. 105, § 17, to the penalty for making a false return. *Hassell v. Latham*, 7 Jones, 465.

(a) The return of a sheriff, that dower had been set forth, on a writ of seizin of dower, by three disinterested freeholders, is conclusive; and, if not true, he is liable to an action for a false return. *Estabrook v. Hapgood*, 10 Mass. 313.

When an officer's return of an execution states that he levied it on the land of the judgment debtor, for whom he appointed an appraiser, after giving due notice in

writing to said debtor, "who neglected and refused to choose for himself;" the return must be taken to be true, in an action brought by the judgment creditor for a trespass on the land; and the defendant in such action cannot impugn the levy, on the ground that the officer did not, after taking the land, allow the judgment debtor a reasonable time to appoint an appraiser, as required by statute, although all the proceedings are returned with the date of a single day. *Tyler v. Smith*, 8 Met. 599.

(b) It is both evidence in favor of, and most strongly construed against, the officer. *Smith v. Emerson*, 43 Penn. 456.

illegal.¹ And, on the other hand, where a return of the sheriff, as upon a writ of attachment, fixes on him a liability to the plaintiff, it is not competent for him, in a suit by the latter, founded on such return, to prove that it is incorrect. A direct application for leave to amend the return should be made to the court whence the process issued.² And, in general, the return of an officer is conclusive evidence against him. (a) Thus, where an officer returns on a warrant of distress, that he advertised the goods distrained twenty-four hours before the sale; he cannot give parol testimony, in an action of trespass against him for taking the goods, that he in fact advertised them forty-eight hours before the sale.³ So if a sheriff return that he has made the money and satisfied an execution, when in fact he had received payment in something else, he makes himself liable for money.⁴ So the return of the sheriff, that he has levied on certain property by virtue of the writ, is an affirmation that it is the property of the defendant.⁵

§ 19 b. But, in an action to which an officer is party, he may offer other evidence than his return of his own doings. Thus in trover by an officer against a stranger, for a chattel seized on execution, the officer is not required to prove the seizure by a return on the execution, but may prove it by parol evidence.⁶ And the mere omission to comply with some legal formality in his return will not make the officer a trespasser. Thus, in an action of trespass for taking and carrying away a wagon, the defendant offered in evidence a writ of attachment, directed to him as an indifferent person for service, and by virtue of which he took the property. Held admissible, although the defendant did not make oath to his return, before judgment in the suit upon which the property was taken.⁷

§ 20. The particular facts upon which the officer would rely, as

¹ *Delvalle v. Plomer*, 3 Camp. 47.

² *The Governor v. Bancroft*, 16 Ala. 605.

³ *Purrrington v. Loring*, 7 Mass. 388.

⁴ *Tiffany v. Johnson*, 27 Miss. 227.

⁵ *Thornton v. Winter*, 9 Ala. 613.

⁶ *Hovey v. Lovell*, 9 Pick. 68.

⁷ *Edmonds v. Buel*, 23 Conn. 242.

(a) In an action by the plaintiff in an execution against the sheriff, on his return of the execution levied, it is no defence, that the property levied on was not the property of the defendant. *Miller v. The Commonwealth*, 5 Barr. 294.

But where the sheriff returned upon an

execution, that before its delivery to him another against the same party was placed in his hands, upon which he seized the debtor's goods; held, in an action for false return, he was not estopped to deny that the goods belonged to the debtor. *Remmett v. Lawrence*, 1 Eug. L. & Eq. 260.

exempting him from liability upon his general return, should be specifically stated.¹ (a) Thus when a sheriff is prevented by force from arresting a defendant, he should return the facts in excuse; but a return of *non est inventus*, in such case, is a false return.² So the return of "*cepi*," upon a writ of *ca. sa.*, is a sufficient return, and signifies that the sheriff has taken the body of the defendant, and has him ready to be produced, &c., and is *prima facie* evidence of those facts. But in an action on the sheriff's bond for an escape, the plaintiff may deny and disprove such return; and, after a permissive escape has been proved, the burden of proof is upon the sheriff, to show that his return is true.³ So it has been held, that a sheriff, having returned that he had levied on the property of the defendant in a *fi. fa.*, is estopped to deny the truth of such return.⁴ And a levy by an officer, even though not conclusive record evidence of the defendant's title, raises a strong presumption against the officer, which he must repel by proof. Hence, when a sheriff has indorsed a levy on property, which is afterwards taken from him by a writ, it

¹ See *Barnet v. Bass*, 10 Ala. 951.

² *Houser v. Hampton*, 7 Ired. 333.

³ *State v. Lawson*, 2 Gill, 62.

⁴ *Sutton v. Allison*, 2 Jones, 339.

(a) See *Morgan v. Spangler*, 14 Ohio St. 115; *Douglas v. Whiting*, 28 Ill. 362; *Castner v. Symonds*, 1 Min. 427.

A return to a *fi. fa.*, that the judgment had been satisfied by the defendant in execution, is bad. *Abercrombie v. Chandler*, 9 Ala. 625.

When a sheriff is sued for failing to return an attachment, it is no defence that the property levied on was not subject to attachment. *The Governor v. Baker*, 14 Ala. 652.

Nor that the debt has been paid. *Ibid.*

But he may show, in mitigation of damages, that by a mortgage and sale of the property, previous to the seizure, the defendant had parted with his interest. *Ibid.* But see *French v. Allen*, 50 Maine, 437.

A return of a constructive attachment of "all the hay and grain in the town of F." is bad. *Rogers v. Fairfield*, 86 Verm. 641.

So, "served on A. B." *Park v. Long*, 7 Clarke, 434.

Where notice is required in "a public newspaper," the word "newspaper" is sufficient in the return; that it is public, being implied. *Bailey v. Myrick*, 50 Maine, 171.

In reference to other execution creditors or to purchasers, the sheriff must designate the property taken in the body of his re-

turn, or by reference to an accompanying schedule. But as to all other persons, the levy is a seizure, and the indorsement merely evidence of it. Thus, in an action by an officer for a mare, which after levy had been taken by the defendant; the plaintiff may prove that the mare was one of "two horses" levied on, and so returned upon the execution. *Weidensaul v. Reynolds*, 49 Penn. 78.

A return to a service of summons is good, if signed by the sheriff, although the signature has nothing to indicate by what authority he served it. *Thompson v. Haskell*, 21 Ill. 215.

The word "served" is held sufficient. *Folsom v. Carli*, 5 Min. 333.

Or a service by sale "pursuant to law." *Tullis v. Brawley*, 3 Min. 277.

Primâ facie, a return of "served" by the proper officer on a writ in a foreign state, on which judgment has been rendered in that state, is sufficient. *Latterett v. Cook*, 1 Clarke (Iowa), 1.

In a meane process of attachment, which does not divest property but merely creates a lien, it is sufficient that the return state that the process was duly executed; the acts of the officer are thereupon to be presumed regular, though not set out in detail. *Ritter v. Scannell*, 11 Cal. 238.

is proper he should state the fact in his return; though his omission to do so will not preclude him from proving the fact by evidence *aliunde*.¹ So a sheriff's return to a *fi. fa.*, setting forth as an excuse for not having sold and collected the money, that the goods were casually destroyed by fire; or a return of a judge's order to stay proceedings; is *prima facie* evidence of the fact, even in his own favor.²

§ 20 *a*. But a return of *nulla bona* to a writ of *fi. fa.* means *no goods applicable to the plaintiff's writ*. Therefore, where a declaration, for a false return of *nulla bona*, alleges that the sheriff took in execution goods of the judgment debtor of the value indorsed on the writ, and levied the same thereout; to which the defendant pleads, that he did not levy *modo et forma*; the defendant may show that the plaintiff's judgment was obtained by fraud, and that the defendant had paid over the proceeds of the levy to another execution creditor, although the writ of the latter was subsequent in date to that of the plaintiff's.³ (*a*) So, if a sheriff be ruled for failing to make the money on an execution, which he had levied on certain negroes, as the property of the defendant, he may rebut the *prima facie* liability which his return raises against him, by showing that the negroes were taken from his possession under a writ of *habeas corpus*, and were discharged as free persons, and the writ of *habeas corpus*, and proceedings thereon, are admissible evidence for that purpose.⁴

§ 20 *b*. Although, in general, justification under a *return* implies not merely the making of the official certificate so designated, but its actual return to, or deposit in, the proper repository; it has

¹ The Governor v. Gibson, 14 Ala. 326.

² Browning v. Hanford, 7 Hill, 120.

³ Shattock v. Carden, 11 Eng. L. & Eq. 570.

⁴ Union Bank, &c. v. Benham, 23 Ala. 143.

(*a*) A creditor in a junior execution cannot sustain an action against the sheriff for falsely returning it *nulla bona*, by proof that a prior execution was issued on a judgment, confessed with intent to defraud creditors, and that the sheriff was notified of that fact while both executions were in his hands, and also that a claim would be made on that ground, to have the proceeds of property levied on applied on his execution. In such case, it is the duty of the junior execution plaintiff to move, without unreasonable delay, and procure a stay upon the sheriff's returning the prior execution, until his motion can be heard and decided. It is no part of the sheriff's duty,

unless cognizant of facts incontrovertibly establishing the fraud, to take the risk of the controversy, as to the validity of the judgment claimed to be fraudulent as against creditors; but only, after being notified that proper proceedings will be taken to determine the controversy, to retain the money levied on for a reasonable time. But, in such action, he cannot justify under a levy by a prior execution, which he has also returned *nulla bona*. He must either have executed it, and applied the proceeds of the property upon it, or have it in his hands so as to be bound to execute it and make such application. Paton v. Westervelt, 2 Duer, 362.

been held, that the return indorsed upon a *fi. fa.*, stating the fact of a levy upon the defendant's property, is admissible evidence for the sheriff, in an action against him *by the defendant*, though the *fi. fa.* has not been filed in the clerk's office.¹ So, where a sheriff was sued for breaking and entering the plaintiff's dwelling-house, after being forbidden so to do, and his right thus to enter depended upon his having previously levied upon personal property therein; held, a statement of such levy, indorsed by the sheriff upon the *fi. fa.*, which had not been filed, with an inventory of the goods levied on attached thereto, was competent evidence for him of the facts stated in it.²

§ 21. A sheriff is responsible for a trespass done by *his deputy*, by color of his office.³ (a) Trespass is the proper action against the sheriff, for an injury done by his deputy to the person or property of another.⁴ And in trespass against a sheriff, in which he is declared against personally, and not as sheriff, it is held competent to prove that the defendant was sheriff, and that his deputy,

¹ Glover v. Whittenhall, 2 Denio, 633.

² Ibid.

³ State v. Moore, 19 Mis. 369. See Met-

calf v. Stryker, 31 N. Y. (4 Tiff.) 648; Pervear v. Kimball, 8 Allen, 199.

⁴ Campbell v. Phelps, 17 Mass. 244; 1 Ib. 530.

(a) One specially deputed by a sheriff, though he has not taken the oath of office, is an officer *de facto*. Merrill v. Palmer, 13 N. H. 184.

It is sometimes held, that a deputy is not to be regarded as an agent or as sustaining an identity with the sheriff; but that the connection is one of *official relation and responsibility*. Flanagan v. Hoyt, 36 Verm. 565. It is elsewhere treated as a relation of *agency*. Curtis v. Fay, 37 Barb. 64.

Where a person acting under a void deputation levied on property, and the property, together with the execution, was returned into the hands of the sheriff, and by him sold; it was held, that the sheriff was protected by such execution, in a suit against him. Crockett v. Latimer, 1 Humph. 272.

A sheriff is liable for his deputy, whether the process was given the deputy by the sheriff or some other person. Matthis v. Pollard, 3 Kelly, 1.

Disputes between deputies of the same sheriff, respecting property attached by them respectively, should be adjusted by the sheriff, and not by actions between the deputies. Foster v. Perley, 9 Mass. 112.

In California, a *constable*, like any other ministerial officer, has the right to appoint as many deputies as he may please; and the deputy is not guilty of trespass in levying

legal process in his hands. Taylor v. Brown, 4 Cal. 188.

It is not criminal negligence in the sheriff, if the jailer, instructed to obey the orders of a deputy, obeys clearly illegal orders. Nall v. State, 34 Ala. 262.

Where a deputy, at a sale on execution, obeys the specific directions of the plaintiff, the sheriff, as to such plaintiff, will be discharged from his liability. Otherwise, where the deputy neither acts in the line of duty as prescribed by law, nor obeys the directions of the plaintiff. Sheldon v. Paine, 10 N. Y. (6 Seld.) 398.

The return of a deputy is binding on the sheriff, in a case arising between one of the parties to an execution and the sheriff. Ibid.

A writ issued to the sheriff; was served, and the return signed, by the deputy; and it appeared of record that the return was amended by the sheriff in open court, and a general appearance was entered. Held, though the sheriff's name should have been signed by his deputy, the defect was cured or waived. Campbell v. Swasey, 12 Ind. 70.

The service of a writ on the sheriff by his deputy, though invalid, must be pleaded in abatement. Shaw v. Baldwin, 33 Verm. 447. See Dooley v. Root, 13 Gray, 303; Krum v. King, 12 Cal. 412.

as such, committed the trespass. And it is not necessary to prove that the defendant directed his deputy to seize the particular property in question.¹ But trespass on the case, for any mere *nonfeasance* of the deputy, is held to lie only against the sheriff.² So the sheriff may be liable in trover for an act of his deputy. Thus a sheriff's officer seized goods under a *fi. fa.*, and packed them up. The execution was afterwards abandoned, on an agreement that the plaintiff in the action should receive goods for his demand instead of money. A portion of the goods, however, which had been seized, were afterwards sent by the under-sheriff's agent to the sheriff's officer, to hold till the plaintiff should pay him the expenses of the levy. The plaintiff afterwards paid the officer, and the goods were forwarded to the plaintiff. Held, a sufficient conversion, to render the sheriff liable in trover to the assignees of the defendant in the action, who had become bankrupt upon an act of bankruptcy committed before the execution.³

§ 22. It has been held, that, where a sheriff is liable for his deputy, they cannot be sued jointly.⁴ (See chap. 33.) It is otherwise, however, where the sheriff has expressly ratified the doings of his deputy. Thus, where a deputy levied upon and took property, in the hands of an alleged fraudulent purchaser, and sold enough to pay the execution, leaving a considerable surplus, of which a portion was returned to the purchaser in a damaged state, and another portion was not returned at all; and the sheriff had ratified all the acts of his deputy in the matter: held, they were jointly liable for the goods not returned, and for the injury to the others.⁵ (a) But, after a judgment in trespass *de bonis aspor-*

¹ Poinsett v. Taylor, 6 Cal. 78.

² Abbott v. Kimball, 19 Verm. 551.

³ Carlisle v. Garland, 7 Bing. 298.

⁴ Moulton v. Norton, 5 Barb. 286. See

1 Pick. 62.

⁵ Waterbury v. Westervelt, 5 Seld. 598.

(a) Trespass against the sheriff and S his bailiff, for breaking the plaintiff's house and taking his goods. Plea by S, justifying under a writ of *fi. facias* directed to the sheriff, and a warrant from the sheriff to him. Replication, alleging a prior warrant to J and a seizure by J under the writ and warrant, and payment by the plaintiff to the sheriff in satisfaction of the writ. Rejoinder, traversing the prior seizure under the writ and the payment to the sheriff. It appeared that L, the clerk and head officer of J, entered the plaintiff's

house and seized his goods under the warrant. The plaintiff paid the amount to L at J's office, and L withdrew the man in possession, and sent notice to the execution creditor, in J's name, that the money was levied. In the course of the same day J died, and the execution creditor, upon application at the office, did not obtain the money. The sheriff then issued the warrant to S, who seized the plaintiff's goods, and remained in possession for several days. The jury did not agree as to whether L paid the money to J before his death,

tatis against a deputy sheriff, and an execution levied on his body, but not satisfied, no action lies against the sheriff.¹

§ 23. The sheriff is bound only by *official* acts or defaults of the deputy. Thus the acceptance, by a deputy sheriff, of an order on him, to pay over the proceeds of an execution in his hands for collection; is not an official act, for which the sheriff is responsible.²

§ 24. Nor is the sheriff liable, in consequence of any act of the deputy, recognizing his own liability, in reference to an act for which the law would not hold the deputy responsible. Thus, where the sheriff was not bound by virtue of his office to cause an execution levied by him on land to be recorded in the registry of deeds; and his deputy, having so levied, received the fees for recording of the judgment creditor: the sheriff was held not answerable for the neglect of his deputy to record the execution.³

§ 25. A sheriff is not responsible for the act of his deputy, performed while he was the deputy of a former sheriff.⁴ But where a sheriff, on going out of office, becomes the deputy of his successor, the latter is liable for the acts of the former in respect to process which came to his hands while he was sheriff.⁵

§ 26. A deputy sheriff is bound to keep goods which he *attaches*, to be taken on execution, until thirty days after judgment, whether he remains in office until that time or not; and the sheriff, under whom he acted, is responsible for any omission of such duty. If such sheriff ceases to be in office before judgment is rendered, and the same deputy becomes the deputy of the succeeding sheriff, and the execution is put into such deputy's hands for collection, within the thirty days; he is bound, as deputy of the

¹ Campbell v. Phelps, 1 Pick. 62.

² Moore v. Jarrett, 10 Tex. 201.

³ Tobey v. Leonard, 15 Mass. 200.

⁴ Wilton, &c. v. Butler, 34 Maine, 431.

⁵ Mathis v. Pollard, 3 Kelly, 1.

but they found that L executed the warrant by the direction of J, and that the money was received by L in pursuance of authority from J. The Judge directed the jury that they might find that the money had been paid to the sheriff. The jury found for the plaintiff, damages £400. Held, that there was sufficient evidence of a payment to J after an execution *de facto* under the prior warrant; and that no irregularity in

the execution could be taken advantage of by the sheriff, or those acting under the sheriff, so as to enable them to set up the validity of the second warrant; and therefore there was no misdirection. Also, that the damages, though not excessive as against the sheriff, were excessive as against S. Gregory v. Cotterell, 18 Eng. L. & Eq 99.

former sheriff, to have the goods ready to be taken on the execution, without any previous demand.¹ (a)

§ 27. A sheriff may become liable to a *debtor*, as well as a creditor, for the wrongful acts of his deputy. Thus a deputy sheriff was ordered to attach certain real estate, which he did. He afterwards told the debtor, who was ignorant that the writ had been served, that he was going to attach personal property. The

¹ *Lambard v. Fowler*, 25 Maine, 308.

(a) Where a statute provides that a deputy of a sheriff may continue to act after the death of the sheriff, and a subsequent statute, that in case of such death the coroner shall act as sheriff; the latter act does not repeal the former. *M'Cluskey v. M'Neely*, 3 Gilm. 578.

In an action against a sheriff for the default of A, his deputy, the declaration averred, that the plaintiff recovered judgment against M, and took out execution thereon, and delivered it to A; that goods and real estate were attached on the original writ by F, another deputy, and were held by him to satisfy said execution; yet that A neglected to levy the execution on the real estate attached, and to seize and sell the goods attached, and to return the execution. The agreed facts in the case were, that the execution was sent to F after he was out of office, and he delivered it to A within thirty days after judgment, and informed him that the goods attached were delivered to O, who gave a receipt for them, and re-delivered them to M, the debtor, who afterwards sold them; that F and A went to O's house, and A demanded of him the goods; that F then delivered the receipt to A, on the back of which O had written and signed an acknowledgment, that A had demanded of him the goods therein mentioned; that A accepted said receipt, and that O promised to pay the amount in a short time, but afterwards became insolvent; that A had no knowledge of the attachment of the real estate within thirty days after judgment; that before the expiration of that time M had alienated said estate; that no instructions were ever given to F or A to levy on real estate or in what manner to collect the execution; and that A never returned the execution into the clerk's office, but enclosed it in a letter directed and sent by mail either to the clerk or to the creditor's attorney. Held, that A was not guilty of any default, for which an action could be maintained against the sheriff, besides that of not returning the execution, for which the sheriff was liable to nominal damages. *Lawrence v. Rice*, 12 Met. 535.

Under the same facts it was held in another case, that F, though out of office, was bound to keep the property safely thirty days after judgment; but that, in order to charge him or the sheriff for his default, it must appear that the property was demanded of him, unless he waived a demand, within thirty days after judgment, by an officer having the authority and charged with the duty of satisfying the execution. Also, that if A, who received the execution from F, was not to be considered as if employed by the plaintiff, then no person was authorized and employed by the plaintiff to serve the execution, and that no legal demand was made on F; but if A was to be considered as if he received the execution from the plaintiff, then he was the plaintiff's agent to demand the property of F. Held, further, that there was, 1st, either no demand by A on F for the property; or, if there was, then, 2d, that the delivery of the receipt by F to A, after a demand on O by F, or by A in F's presence, rendered O responsible on his receipt; and that the acceptance of the receipt by A was an admission by him of a sufficient compliance with such demand, and a waiver of any further performance; and that the action could not be maintained. *Lawrence v. Rice*, 12 Met. 527.

An action on the case lies against an ex-sheriff, for omitting to deliver to the new sheriff a writ of *supersedeas*, by reason of which omission the plaintiff was taken in execution. *Calthrop v. Phillips*, 2 Mod. 217.

One having a right of action against the representative of a deceased sheriff, whose estate is represented insolvent, for the malfeasance of the sheriff or his deputy, must prosecute his claim before the commissioners, and obtain a decree of the Judge of Probate in his favor, in order to entitle him to a remedy upon the bond given by the sheriff, for the faithful performance of the duties of his office, &c.; and he cannot maintain an action at law, except in the cases provided by the laws respecting insolvent estates. *Todd v. Bradford*, 17 Mass. 527.

debtor asked him if money would not answer, and he replied that it would, upon which he received of the debtor a sum of money, and made return that he considered it as personal property attached. The deputy having embezzled the money, the sheriff was held responsible to the debtor, who had been compelled to satisfy an execution issued in favor of the creditor.¹

§ 28. In an action against the sheriff for the misfeasance of his deputy, in general, the defendant can give nothing in evidence, which the deputy could not, were he the defendant. Thus he cannot, either by evidence or in pleading, falsify the deputy's return.² And, on the other hand, the letters and confessions of the deputy are held to be competent evidence, and the jury may prefer them to the testimony of witnesses.³ But the return of a person, styling himself deputy-sheriff, is not evidence against the sheriff, without proving him to be a deputy.⁴ And it is said: "The declarations of an under-sheriff are evidence against his principal, not for the reason assigned in *Yabsley v. Doble*, 1 Ld. Raym. 190, that, as he has given security for the due performance of the duties of his office, his declarations go to charge himself, he being answerable over, and the real party in interest. But his declarations are evidence to charge the sheriff, only where his acts might be given in evidence to charge him; and then rather as acts than as declarations; his declarations being considered as part of the *res gestæ*."⁵

§ 29. Not only the deputies of an officer, but other parties whom he employs for his aid, may justify themselves under his authority. (a) Thus, where an officer, who is present at the commission of an offence, or on *hue and cry*, is not able to make an

¹ *Knowlton v. Bartlett*, 1 Pick. 271.

² *Gardner v. Hosmer*, 6 Mass. 325.

³ *Tyler v. Ulmer*, 12 Mass. 163; *Kemp-land v. Macauley*, Peake, 65.

⁴ *Slaughter v. Barnes*, 3 A. K. Marsh. 412.

⁵ Per Gibson, J., *Wheeler v. Hambright*, 9 S. & R. 390.

(a) On the other hand, a person not an officer, but assuming to act as such, may not in all cases incur his liabilities. Thus one who, by false representations that he is qualified to serve civil process, induces another to commit a writ to him for service, is not liable to an action for neglecting to serve it. *Whitney v. Blanchard*, 2 Gray, 208.

Every citizen is bound to assist a known officer in making an arrest when called upon so to do, nor is he bound to inquire

into the regularity or legality of the process. *McMahan v. Green*, 34 Verm. 69.

A known officer had in his hands a warrant against John McManus. He arrested upon the warrant the plaintiff, John McMahan, and the defendant, at the request of the officer, assisted in making the arrest. Held, although the arrest was illegal, the request of the officer was a full justification to the defendant, and he was not liable for false imprisonment. *Ibid*.

arrest, and calls in other officers or the *posse*, their justification is as broad as his own.¹ But no one except the proper officer can execute a search-warrant.²

§ 30. Although an officer, in order to *justify himself* alone, must prove a *legal commission and authority*; a third person, claiming under his acts, is required only to show that he assumed to be an officer and acted as such. And, if the officer is joined with him in a suit by a party claiming to be injured, the same privilege is also extended to the officer; more especially where a return has been made upon the process. Thus, where a shop, placed on land of the plaintiff with his permission, was sold on an execution against the owner, and the purchaser entered upon the land and removed the shop; in an action of trespass for such entry against the purchaser and his assistants, including the officer, the defendants may give in evidence the execution and return, without proving that the person levying the execution was an officer *de jure*.³

§ 31. It will be seen hereafter, (a) that a master or principal is responsible for the wrongs committed by his servant or agent. The same principle applies to the party by whom a suit or prosecution is instituted, as liable for the misdoings of an officer, whom he employs to make service of legal process. (b) It is held, more especially, that the party, for whom a special deputy executes process, is answerable in trespass, if the deputy had not the authority of the law, but only the direction of the party. So, also, if the party assented to the unnecessary violence of the deputy, however he may have been appointed.⁴ And, in general, one who extends the power of a court of special jurisdiction, to a case to which it cannot be lawfully extended, is a trespasser.⁵ Thus,

¹ Main v. McCarty, 15 Ill. 441.

² Halsted v. Brice, 13 Mis. 171.

³ Doty v. Gorham, 5 Pick. 487; Duncklee v. Locke, 13 Mass. 525.

⁴ Stone v. Chambers, 1 Strobb. 117.

⁵ Curry v. Fringle, 11 Johns. 444.

(a) See *Master, &c.*

(b) In reference to the form of action, more especially for wrongful criminal prosecutions, it is said: "Where the immediate act of imprisonment proceeds from the defendant, the action must be trespass and trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of

the wrongful act of that other." Per Ashurst, J., *Morgan v. Hughes*, 2 T. R. 231; acc. *Elses v. Smith*, 2 Chit. 304. (See chap. 6.)

Trespass will not lie against a plaintiff in an execution, upon which the defendant's goods were levied and sold, on the ground that the defendant in the judgment was not served with process. *Baird v. Campbell*, 4 W. & S. 191.

where a warrant is issued from a justice's court, against a person having a family, at the instance of the plaintiff, without the proof required by statute; it is at the peril of the party, and, if the defendant has been arrested, he may have an action of false imprisonment against the plaintiff.¹ (See chapters 6 and 16.) So, where B sued out execution against A, and after seizure and before sale the execution was set aside by rule of Court, of which the sheriff received notice from A before the sale, and by the terms of which A was to bring no action for the seizure; the sheriff having proceeded to a sale, on the ground that he had received no notice of the rule from B, held, that A might sue B in trespass for the sale.² So A, party in a suit between A and B, told the clerk, that, if certain items of cost taxed by B should be allowed, an appeal to a judge would be insisted on; and, after the execution was made out, but was yet in the clerk's hands, A reminded him of the appeal claimed. Held, this was a sufficient entry of the appeal, and, B having obtained such execution through mistake, and after notice of the appeal having caused A to be arrested, whereupon A satisfied the execution; the execution was void, and B was liable to A in trespass, for the amount paid by A, with interest from the time of payment.³ So where property was levied upon by a constable, and *claimed*, and, in a trial before the constable, he found for the claimant, but the creditor directed him, notwithstanding, to sell, and gave him a bond of indemnity; it was held, in trover by the claimant against the creditor, that these facts were evidence, not of title, but as tending to show a trespass by the defendant.⁴ So, where permission was given to a party in interest to use the name of another, as the plaintiff in a writ of attachment, in virtue of which the goods of a third person, not the debtor in the action, were attached by the direction of the real plaintiff; and, after the attachment, the nominal plaintiff, upon being inquired of by the agent of the owner of the goods, whether he was the real or the nominal plaintiff, replied, that he was "the plaintiff," and, upon being further asked if he had not better give up the property, replied, "I guess not:" held, a conversion of the goods.⁵ And where the party, in whose favor a legal process issued, directs the acts of the officer

¹ *Curry v. Pringle*, 11 Johns. 444.

² *Perkins v. Plympton*, 7 Bing. 676.

³ *Winslow v. Hathaway*, 1 Pick. 211.

⁴ *Matheny v. Johnson*, 9 Mis. 230.

⁵ *Walcott v. Keith*, 2 Fost. 196.

done under it, he cannot set up the defence, that the process, and not the direction, influenced the officer ; or show that the trespass would have been committed without his interference.¹ And, if an execution plaintiff attends the sale of property wrongfully levied on, and becomes himself a purchaser of a part thereof, he so far participates in the sale, as to become jointly liable with the sheriff to an action of trespass.²

§ 32. With more particular reference to the wrongful taking of one man's property by virtue of process against another ; it is held, that, to maintain either replevin or trespass, it is not necessary to show an actual, forcible dispossession of the plaintiff ; but any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damnified, is sufficient to maintain an action. And as a sheriff, by levying on goods and chattels, which are not the property of the execution defendant, is a trespasser ; if the plaintiff in the execution directs the levy to be made, he is a trespasser also. The officer, in such case, is the plaintiff's servant or agent, and trespass or replevin will lie against either of them.³ And trespass has been said to be the only remedy for damage occasioned to the plaintiff, by the malicious act of the defendant, in causing an execution issued against a third person to be levied on property belonging to the plaintiff.⁴ But trover has also been maintained ; though it is not sufficient to maintain trover against the plaintiffs in an execution, that their attorney in the judgment had directed the sale.⁵

§ 33. If an officer, by making an arrest under a void precept, renders himself liable for trespass, persons assisting him at his request are liable also.⁶ But a voidable execution, until avoided, is a protection to the party at whose instance it issued and was executed.⁷ So a party is answerable only for the validity of the process and for good faith in suing it out ; not for any *irregularity* of the sheriff in executing it, unless committed by his orders.⁸ And, whether a subsequent assent to the trespass will or will not make him a trespasser *ab initio*, such assent must be clear and explicit, and founded on a clear knowledge of the trespass.⁹ Nor

¹ Coats v. Darby, 2 Comst. 517.

² Deal v. Bogue, 20 Penn. 228.

³ Stewart v. Wells, 6 Barb. 79 ; Lewis v. Jones, 2 Gale, 211. See Dameron v. Williams, 7 Mis. 138.

⁴ Tatum v. Morris, 19 Ala. 302 ; Hale v. Ames, 2 Monr. 143 ; Libby v. Soule, 1 Shepl. 310.

⁵ Averill v. Williams, 4 Denio, 295.

⁶ Vinton v. Weaver, 41 Maine, 430.

⁷ Cogburn v. Spence, 15 Ala. 549.

⁸ Adams v. Freeman, 9 Johns. 117.

⁹ Ibid. ; West v. Shockley, 4 Harring. 287 ; Kreger v. Osborn, 7 Blackf. 74. See Read v. Markle, 3 Johns. 523.

is a plaintiff in execution liable, in an action on the case, for a tort committed by the sheriff in executing the writ.¹ (a) So the person, who assists an officer in making a legal levy, will not become a trespasser, by a subsequent abuse by the officer of his authority.² (b) So the execution creditor is not liable for taking the property of a stranger, unless he ordered the taking of it.³ So, when the party does not control or direct the course of an officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser by relation; the party is not affected by it, even when he receives the money coming by such irregularity, although aware of the course pursued by the officer. He is not liable, unless he consents to the officer's course, or subsequently adopts it. The expressing of an opinion under protest will not constitute such consent.⁴

§ 84. With regard to the *amount of damages* against an officer, it will be seen to depend upon the nature of the particular default committed by him. (c) In the present connection, however, it may be stated, that, in general, the amount of the judgment is *prima facie* the measure of damages. And proof of actual damage is unnecessary.⁵ But in case of unintentional default, the

¹ Princeton, &c. v. Gibson, Spenc. 138.

⁴ Hyde v. Cooper, 26 Verm. 552.

² Wheelock v. Archer, 26 Verm. 380.

⁵ Douglass v. Baker, 9 Mis. 40.

³ Swinely v. Fahnestock, 18 Md. 391.

(a) An action on the case will not lie by a landlord, against the plaintiff in execution, or against any other person, for advising, procuring, or commanding a sheriff to sell and remove the goods of a tenant whose rent is unpaid; such plaintiff or other person knowing that the sheriff had received notice that the rent was due, and intending to prevent the landlord from collecting it. Princeton, &c. v. Gibson, Spenc. 138.

A party cannot justify taking the property of a third person, as an assistant of a sheriff, unless the property is in fact taken by the officer under his process. It is no justification of such taking, that the assistant supposed, from the conduct of the officer, that the property had been attached. Johnson v. Stone, 40 N. H. 197.

(b) If an officer sell property attached by virtue of a statutory provision, without notifying the defendant; in trover, this does not make the attaching creditor jointly liable with him, unless he did something more than request a sale, although he join with the officer in a special plea, if there is

also a general several plea. Abbott v. Kimball, 19 Verm. 551.

(c) As in case of delay, till it becomes impossible to execute the process. Douglass v. Baker, 9 Mis. 40.

In an action against a sheriff, for not collecting and returning an execution against the property and body of A, B, and C, running against the property and body of A, and against the property of B, and C; the defendant may prove, in mitigation of damages, that A was, during the entire life of the execution, in Canada, and that no one of the debtors had any property, but they were absolutely bankrupt; that there was no bail or attachment, and that the plaintiff had not been damaged. And the plaintiff is only entitled to nominal damages. Ives v. Strong, 19 Verm. 546; acc. Kidder v. Barker, 18 Verm. 454.

In a suit against a sheriff for levying upon and selling goods of the wrong person, evidence, that he applied part of the proceeds of the sale to the discharge of a lien on the goods, is not admissible in mitigation of damages. McMichael v. Mason, 13 Penn. 214.

officer may prove the real injury sustained by the plaintiff. And, on the other hand, in case of wilful wrong, it is said that the plaintiff may recover, in addition to the debt, his incidental expenses and costs not taxable. A sheriff has been permitted to show, in mitigation of damages, the poverty of the debtor, or his continuing liability to arrest.¹ (a)

¹ *Evans v. Manero*, 7 M. & W. 463; *Bing*, 317; *Young v. Hosmer*, 11 Mass. Williams v. Mostyn, 4 M. & W. 145; 89; *Commonwealth v. Lightfoot*, 7 B. Weld v. Bartlett, 10 Mass. 470; *Brooks v. Monr.* 298. Hoyt, 6 Pick. 468; *Barker v. Green*, 2

(a) See chap. 22. A sheriff, by virtue of a *fi. fa.*, seized goods upon lands leased to a tenant, sold them for less than a year's rent, and permitted them to be removed without paying the landlord the year's rent, which was due. The latter brought an action on the case against the sheriff for such removal, and the Court refused, on payment into court of the sum which the goods produced, to stay the proceedings, until the plaintiff undertook to pay the costs of suit, in the event of his not recovering more than the sum paid into court. *Calvert v. Jolliffe*, 2 B. & Ad. 418.

CHAPTER XXX.

ATTACHMENT AND EXECUTION.

1. Attachment — nature and purpose of an attachment — an *alternative* remedy.
3. Officer's title to, and right of action for, property attached. Title of a *receptor* or *keeper*.
4. Responsibility for failing to attach, or for property attached.
5. *Receptor* and *keeper*.
10. Right to indemnity; attachment of the property of a third person, or property not subject to attachment.
15. Liability of the officer to the defendant in the suit.
16. Trespass *ab initio*.
17. Levy of execution upon property attached; duty and liability of the officer.
19. Successive attachments.
22. Sale, &c., of property attached.
24. Rights and liabilities of the sheriff in connection with the acts of his *deputy*.
25. Effect, upon an attachment, of the *death* of parties.
27. Property exempt from attachment.
28. Damages.
30. Rights and liabilities of officers in connection with *executions*. Suit by a purchaser of property.
31. Property exempt from execution.
32. Successive acts of a levy may be joined.
33. Trespass *ab initio*.
34. Levy upon the property of a third person.
36. Mode of levy, and instructions relating thereto.
37. *Return* of executions.
40. Payment of money collected on execution.
46. Title of an officer to property levied on, and right of action therefor.
48. Damages.

§ 1. In those States where the practice of *attachment upon mesne process* (*a*) prevails, the rights and liabilities of an officer are often brought in question, in connection therewith.

(*a*) *Attachment* is the actual or constructive taking of property upon a writ, as security for the claim sued upon. But it seems that a return of an attachment of personal property does not conclusively prove a taking, so as to subject the officer to an action of trespass. *Boynton v. Willard*, 10 Pick. 166.

And it has been held that an attachment cannot be made of personal property, though of such a kind that it cannot be immediately removed, by a mere indorsement on the writ. The officer must be present and take the property into his possession. *Darling v. Dodge*, 36 Maine, 370.

Where an officer attaches goods, and takes a receipt for the redelivery of them on demand, or payment therefor, and leaves them without removal; he must, in order to preserve the attachment, retain the control thereof himself, or by his servant, or have the power of taking immediate possession. If the possession is abandoned, the attachment is dissolved. *Weston v. Dorr*, 12 Shep. 176.

The nature of the officer's possession and custody depends upon the nature and position of the property, the expense of removal, and the kind of possession retained by the owner; and, in general, it must be such a custody as will enable the officer to assert his control over the property, and as will probably prevent its being withdrawn or taken by another without his knowledge. (See § 3.) *Hemmenway v. Wheeler*, 14 Pick. 408; *Bicknell v. Trickey*, 34 Maine, 273. See *Marshall v. Town*, 2 Williams, 14; *Flanagan v. Jerome*, 5 Dutch. 391.

An officer, who was in possession of a room, allowed A to store personal property there, and afterwards, on a writ against A, attached the property and took exclusive possession of the room, fastened the outer door, but neglected to fasten an inner door leading to a wood-room. Held, a valid attachment. *Slate v. Barker*, 26 Verm. 647.

Where lumber attached was in the mill-yard of another, and the officer removed it from one to four rods, the removal was

§ 2. Attachment is a proceeding unknown to the common law, but often provided by statute in this country as a concurrent or

held sufficient to make an attachment, and to render the officer liable to the debtor for the property, after the creditor's lien was gone. *Fletcher v. Cole*, 26 Verm. 170.

An officer attached a parcel of hewn stones, lying in the town of Worcester, on land belonging to the Commonwealth, by going among and upon them, and directed the creditor, who had receipted for them, and whose place of business was about fifty or sixty rods distant from where the stones lay, and in sight of a part of them, to take charge thereof; but the stones were not removed. No notice was given to any one of the attachment, although there were persons at work or residing near, nor was any other mode adopted of giving notoriety to the transaction. A few days after the attachment, a person was summoned as a trustee in the same writ, and the creditor informed him of the attachment, but desired him not to inform any other person thereof, saying that he did not wish to injure the credit of the debtor. Held, that the attachment was valid, as against a subsequent attachment made without notice thereof, and that sufficient possession was retained to continue it in force. 14 Pick. 408.

See, as to the constructive attachment of bulky articles, *Clement v. Little*, 42 N. H. 563; *Polley v. Lenox, &c.*, 4 Allen, 329. As to appraisal, in case of attachment, *Stockwell v. Byrne*, 22 Ind. 6; *Rawley v. Hooker*, 21 Ib. 144. As to the attachment of perishable property, "subject to natural and speedy decay," *Webster v. Peck*, 31 Conn. 495.

If a sheriff, having a writ of attachment, goes to the store of the debtor, whose clerk, in the absence of his master, locks the store and delivers the key to the officer; this is a sufficient attachment of the goods in the store, as against another officer, who afterwards, by the connivance of the debtor, attaches and removes them. *Denny v. Warren*, 16 Mass. 420.

So, where an officer enters a store, where there are goods belonging to the debtor, declares his intention to attach them, and afterwards locks the store, retaining the key; the attachment is good against an attachment by another officer; he, or the creditor employing him, knowing of the prior attachment. *Gordon v. Jenney*, 16 Mass. 465.

But where an officer had attached certain articles, and afterwards mixed them with other articles of the same kind attached before by another officer, upon a writ against

the same person; held, he lost the lien upon those articles which he acquired by his attachment, and the other officer rightfully retained them. *Ibid.*

(See, as to the effect of substitution, or mixture, or confusion, in case of attachment or execution, *Crosby v. Baker*, 6 Allen, 295; *Roth v. Wells*, 29 N. Y. (2 Tiff.) 471; 4 Barb. 194; *Morgan v. Spangler*, 14 Ohio St. 115. That, before attaching goods not belonging to the debtor, though mixed with his, the officer must make inquiries; see *Cartton v. Davis*, 8 Allen, 94. As to the attachment of a joint interest, by taking the whole; see *Bernal v. Hovious*, 17 Cal. 541.)

And an attachment implies, that the debtor has ceased to have possession or control of the property; and this notwithstanding any private agreement with the creditor. Thus, where a defendant, whose property had been attached, made an agreement with the plaintiff, that the defendant should take the property, and, if an adjustment of the suit should not be made, should return it, and the plaintiff might then sell or dispose of it as he chose, and apply the proceeds to his claim; and the property was thus delivered and returned, and afterwards sold by the officer upon the writ, the defendant forbidding the sale; it was held, that the defendant had a right to revoke the license to sell. *Wallis v. Truesdale*, 6 Pick. 455.

But the same principle does not apply to a third person in possession of property, under an alleged lien against the debtor. Thus, where goods in the possession of a party who had a lien on them were attached, and he receipted for them to the officer, under an agreement that he should continue to retain for his lien; and afterwards they were attached at his own suit, and he receipted for them, still asserting his lien: it was held that the lien was not discharged. And it was further held, the defendant in the suits not being the owner of the goods, and the general owner having brought replevin against the officer; that, although the attachments were void, and the defendant could not justify as an officer, he might do so as the servant of the party having the lien. *Townsend v. Newall*, 14 Pick. 332.

Where a quantity of hay, cattle, and other personal property was attached, and the officer appointed a keeper, giving him an order of possession in the usual form, and posted up a notice of such attachment on a beam in the barn; and the keeper afterwards went off and abandoned all pos-

alternative remedy for the enforcement of a debt or other claim. It is well settled, however, that a plaintiff must *elect* between the two remedies of attachment and arrest,— he cannot resort to both. Thus, if an officer attach the estate of a defendant after having arrested him, and return only the attachment, he is liable for a false return to a subsequent attaching creditor.¹

§ 3. An officer, by attaching goods, acquires a special property in them, and trover is a proper action against a wrong-doer who converts them to his own use. And, as in other cases, actual use and exercise of ownership over the property, under a claim of a right of property and right of possession, asserted when the demand was made, is competent evidence of conversion.² (a) So the officer may maintain trespass, even though he have not actual possession. (See p. 218, n.) Thus where a deputy sheriff in Massachusetts, having attached goods, carried them into Rhode Island, and delivered them to a bailee, taking his receipt, and the bailee put them into the hands of another person for safe-keeping; held, the officer might maintain trespass, and recover damages to the value of the goods, against mere strangers who took them away from the keeper in Rhode Island.³ And the sheriff of another State may maintain his title to attached property.⁴ So an officer may sue for property attached, though he has resigned and left the Commonwealth.⁵ So the *receiptor* of property attached, who has the actual possession of it for safe-keeping, may maintain trover against a third person, who takes it out of his possession without color of right.⁶ But where a sheriff, having attached personal chattels, delivers them to a third person for safe-keeping, such person is the mere servant of the sheriff, and has no legal interest in the chattels; he cannot therefore maintain trover for them.⁷ (See p. 224, n.) And, on the

¹ Brinley v. Allen, 3 Mass. 561.

² Lathrop v. Blake, 3 Fost. 46; 2 Tidd's Prac. 942. See Kelly v. Lane, 42 Barb. 594.

³ Brownell v. Manchester, 1 Pick. 232.

⁴ Rhoads v. Woods, 41 Barb. 471.

⁵ Polley v. Lenox, &c. 4 Allen, 329.

⁶ Thayer v. Hutchinson, 13 Verm. 504.

⁷ Ludden v. Leavitt, 9 Mass. 104.

session of the property: held, that the lien created by the attachment was thereby lost. Sanderson v. Edwards, 16 Pick. 144.

An attachment, in order to be legal and available, must be so *at the time*, and cannot become so afterwards. Thus, if an officer having a writ of attachment, take possession of the property of the debtor on Saturday evening, after sunset, with a view to the immediate operation of the writ upon the property as an original attachment; he ac-

quires no lien, and the Court will not give effect to it, as an attachment made at the earliest hour on the next Monday morning at which an attachment could lawfully be made, although the officer remain in possession of the property until after that hour. Fifield v. Wooster, 21 Verm. 215.

(a) See, as to the title of an officer to *bulky* articles, Johnson v. Grand, &c. 44 N. H. 626.

other hand, where goods attached by a deputy sheriff are deposited in the hands of a keeper, to be forthcoming on demand; the sheriff has a special property in them, and may maintain an action for them against the keeper, for the benefit of the attaching creditor.¹ (a) So an officer who has attached personal chattels, and delivered them, upon his accountable receipt, to a third person, who has permitted the owner to retain them, may lawfully take them from the owner, even after he has given him a summons.² And an action lies for one deputy sheriff who has attached chattels, against another deputy of the same sheriff, who takes them from the bailee of the first deputy, upon another writ against the same party.³ And an *executor* of a deputy sheriff may maintain trover for property attached by the testator.⁴ So, if a debtor assign the property attached, to his creditor, in satisfaction of his judgment, the officer is still liable over, and will recover the full amount of one who wrongfully takes the property.⁵

§ 3 a. But attachment of *real estate* gives to the officer no property or right of possession.⁶ And where the plaintiff attached a quantity of starch, which was stored by the debtor in the barn of A, under an agreement that A should have a lien upon it for the security of a debt, as an officer, by virtue of certain writs against the debtor; and at the time of attachment the plaintiff did not move or take possession of the starch, except by notifying A that he had attached it: held, he had not acquired any such property in the starch, as would enable him to maintain trespass therefor, against one who subsequently attached and took possession of it on other writs of attachment.⁷ And an attachment of an article, the sale of which is prohibited, is held to give no right to the officer

¹ *Baker v. Fuller*, 21 Pick. 318.

² *Bond v. Padelford*, 13 Mass. 394.

³ *Thompson v. Marsh*, 14 Mass. 269.

⁴ *Badlam v. Tucker*, 1 Pick. 389.

⁵ *Fletcher v. Cole*, 26 Verm. 170.

⁶ *Scott v. Print Works*, 44 N. H. 507.

⁷ *Blake v. Hatch*, 25 Verm. 553.

(a) In such case, a delivery by the keeper to an adverse claimant is equivalent to conversion. But, if delivered to the debtor's assignees, who had a right to the goods, subject only to the attachment; in an action brought by the sheriff against the keeper after thirty days from the rendition of judgment, the declaration ought to aver a demand upon the keeper, upon the execution, within the thirty days; or else that the keeper had disabled himself from delivering the goods. 21 Pick. 318.

Where a vehicle, advertised to be sold on execution, was delivered by a receiptor at his own house, and, the sale being adjourned, was left by the side of the road and partly in the travelled path, without any one being placed in charge of it by the sheriff, held, the attachment was not thereby abandoned, and the defendant, knowing the purpose to sell, was liable to him in trespass for taking it away. *Houston v. Blake*, 43 N. H. 115.

to maintain an action against a person who takes such article from his possession.¹

§ 4. Where a defendant, against whom an attachment has issued, and been placed in the hands of a sheriff for service, has sufficient property to satisfy the plaintiff's demand, the sheriff is liable for any deficiency, if he does not promptly levy on sufficient property.² And, in an action against a sheriff for failing to serve a process of *garnishment* (a peculiar kind of attachment), the judgment recovered against the defendant in the attachment is *prima facie* evidence of the injury sustained, without producing the note on which it was founded.³ So the direction, by the attorney of an attaching creditor, to the officer, not to attach real estate, does not relieve the officer from liability for not keeping personal property attached by him upon the same writ, to respond to the execution.⁴ And where an officer *returns* an attachment, he is liable therefor to the plaintiff in the action, although the attachment was not made by direction of the plaintiff or his attorney; and the plaintiff will be affected by no facts attending the attachment, which do not appear in the return.⁵ So where, by virtue of express statutes, a mere *constructive* taking of property upon a writ, accompanied by certain prescribed formalities, constitutes an available attachment; as where property may be attached by leaving a copy with the town clerk: the sheriff is bound to use ordinary care that it be forthcoming to answer the judgment.⁶ (a) Though, if guilty of no misconduct or neglect of duty, he is not responsible, if, without his consent or knowledge, the articles are afterwards removed so that they cannot be found to be taken on execution.⁷ So a peculiar liability on the part of the officer is involved in the attach-

¹ *Nichols v. Valentine*, 36 Maine, 322.

² *Ransom v. Halcott*, 18 Barb. 56; *Chickering v. Failes*, 26 Ill. 507; *Chapman v. Thornburgh*, 17 Cal. 87.

³ *Kirksey v. Pryor*, 13 Ala. 190.

⁴ *Austin v. Burlington*, 34 Vt. 506.

⁵ *Franklin, &c. v. Small*, 26 Maine, 136.

⁶ *Smith v. Church*, 1 Williams, 168.

⁷ *Hubbell v. Root*, 2 Allen, 185.

(a) But in Massachusetts, after the revised statutes went into operation, and before the passing of Stat. 1838, c. 186, an officer was directed to "attach specially," without directions as to the property to be attached. He thereupon attached sufficient real estate; but the attachment was lost in consequence of an omission to deposit a copy of the writ, &c., in the clerk's office within three days. Held, the officer was not answerable to the creditor, although

there was sufficient personal property which might have been attached. *Goodnow v. Willard*, 5 Met. 517.

And in an action against an officer for not attaching goods, he may prove, by the admissions of the plaintiff, that an arrangement had been made, by which he was to levy his execution upon real estate, yielding the personal property to other creditors. *Weld v. Chadbourne*, 37 Maine, 221.

ment of *live animals*. It is held that he must provide for their support at his peril ; that he is answerable to the attaching creditor, and his apprehension of incurring expense in maintaining the cattle will not be an excuse for his not retaining them when attached.¹

§ 4 a. Where a sheriff, by virtue of legal process, took into custody a vessel heavily laden with coal, lying near a wharf, and took no precautions to guard the vessel and cargo against the dangers of an impending storm, during which the vessel sunk ; held, there was no evidence, to warrant the submission to the jury of the question of reasonable care and diligence on the part of the sheriff, but the jury should have been charged that he was liable on the ground of negligence.² In the same case it was subsequently held, that the officer was bound to take such steps to insure the safety of the coal, as a careful, prudent man of good sense, well acquainted with the condition of the vessel and her location with regard to exposure to storms, might reasonably be expected to take, if the coal belonged to himself.³

§ 4 b. It has been recently held in Massachusetts, that, where attached goods are *stolen*, the officer is not liable unless guilty of negligence.⁴ But it is held otherwise in Pennsylvania, and that a sheriff is absolutely liable for property levied on, unless deprived of it by act of God, sudden accident, or the public enemy.⁵

§ 4 c. In New Hampshire, a sheriff who has attached personal property is not liable for loss or injury, which is not caused by his negligence or want of ordinary care. When the question is, whether the goods were deposited by him in a suitable place, proof that certain insurance companies were accustomed to treat, as extra hazardous, buildings like that where these goods were placed, is not admissible.⁶

§ 4 d. In Maine, in an action against an officer for not safely keeping goods attached, instructions to the jury, that, where the officer has taken the goods into his custody, and has not stated in his return on the execution that they were taken from him without his fault, the burden is on him to show that he exercised ordinary care in keeping them, and he must satisfy the jury that they were lost without his fault ; are not sufficiently favorable to him. If the officer proves the loss of the goods, and the

¹ Sewall v. Mattoon, 9 Mass. 535.

² Moore v. Westervelt, 2 Duer, 59.

³ Moore v. Westervelt, 27 N. Y. (13 Smith) 234.

⁴ Dorman v. Kane, 5 Allen, 38.

⁵ Hartleib v. M'Lane, 44 Penn. 510.

⁶ Kendall v. Morse, 43 N. H. 553.

attendant circumstances, the burden of proof is then upon the creditor to show negligence. And, in such a case, *theft* is not presumptive evidence of a want of ordinary care.¹

§ 5. As has been seen (p. 220), the attaching officer may deliver the property attached to some third person, who agrees to restore it on demand; commonly called a *receiptor*. (a) Questions have arisen, as to the relative rights and liabilities of the officer and receiptor in reference to the title of the property. Thus a receipt, after enumerating certain goods, said, "the property of, &c. (the debtor), attached on a writ, &c., all which I promise to re-deliver on demand." The goods were re-delivered accordingly to the officer, and the receiptor immediately afterwards replevied them as his own property. Held, he was not estopped by his receipt, nor by the re-delivery of the goods, to deny that they were the property of the debtor.² (b) But where a receipt declares, that "this receipt shall be conclusive evidence against me, as to the receipt of said property, its value, and my liability, under all circumstances, to said officer;" the receiptor is estopped to deny that it

¹ *Mills v. Gilbreth*, 47 Maine, 320.

² *Johns v. Church*, 12 Pick. 557.

(a) Differing from a mere *keeper*, who is strictly a servant of the officer, undertaking to keep the property *for him*; whereas a receiptor ordinarily interposes on the application and for the benefit of the debtor. See p. 220; *Hartshorn v. Ives*, 4 R. I. 471.

(b) It is held that an officer may deliver property attached to the creditor for safe-keeping, and take its value in money as security during the pendency of the suit, and the debtor cannot complain. *Gassett v. Sargeant*, 26 Verm. 424. See *Browning v. Hanford*, 5 Denio, 586; *The State v. Nelson*, 1 Cart. 522.

An officer delivered attached chattels to a bailee, but neglected to demand them on execution until after his lien had ceased, and the bailee refused to deliver them; whereupon he sued the bailee, and, pending the action, the attaching creditor agreed to indemnify him against all costs on account thereof. It not appearing that such suit was prosecuted at the attaching creditor's request, the agreement was held to be without consideration. *Balcom v. Craggin*, 5 Pick. 295.

In an action by a sheriff against a receiptor, it is no defence, that the sheriff was not properly qualified, unless it appears that the suit is prosecuted solely for his benefit, and not for the benefit of the attach-

ing creditor. *Taylor v. Nichols*, 3 Wms. 104.

A receiptor becomes liable to the officer, if he does not deliver the property on demand. The contract is so strictly construed, that a receiptor for horses and hay, who contracts to deliver the same "free from damage or expense," is not entitled even to use any of the hay for the sustenance of the horses. And parol evidence is not admissible in an action against a receiptor, to show that "100 bushels of rye, valued at \$100," were in fact 100 bushels of rye unthreshed. Nor can a receiptor justify by showing that the property was mortgaged, if the mortgagee has made no demand upon him for the property. And an offer to receive it, upon terms which are not complied with, is not a waiver of a previous demand. *Scott v. Whittemore*, 7 Fost. 309.

Another officer, on making demand upon a receiptor for property attached, must state by what authority he makes it. If his right to claim the property is not questioned, the authority distinctly claimed will be deemed to be admitted. *Phelps v. Gilchrist*, 8 Fost. 266.

The officer may take receipted property from one, to whom the receiptor has transferred it with notice and indemnity. *Briggs v. Mason*, 31 Verm. 433.

was the property of the debtor; and the officer, therefore, cannot set up, as a defence to an action against him by the creditor for refusing to deliver the property attached, to be taken on execution, that it did not belong to the creditor, but to the receiptor.¹ (a)

§ 6. If goods attached upon a writ against a third person are delivered to the owner, upon his written receipt and promise to redeliver them to the officer on demand, the owner may nevertheless maintain trespass against the officer; although, in an action by the officer upon such receipt, the owner of the goods would be estopped to set up property in himself. The measure of damages is the value of the goods at the time of attachment, but without interest for the time during which the owner had the use of them under the receipt.² So the defendant, claiming a wagon as his own, took it out of the possession of the plaintiff, and held it about ten days, when the plaintiff attached it, as the property of the defendant, and the officer delivered it for safe keeping to the plaintiff's hired man, who placed it under the plaintiff's shed. The plaintiff thereupon brought trespass against the defendant, for the original taking of the wagon; and it was held, that the wagon was not to be deemed, as matter of law, to have been returned to the plaintiff, by virtue of its having been so attached by him, and placed under his shed; that the plaintiff was not thereby estopped from claiming that he had title to the wagon, when it was taken by the defendant; that the rule of damages was the value of the property, with interest from the time of conversion; but, as this did not appear, interest was not to be included; and that further damages for detention of the property were not allowable.³

¹ *Penobscot, &c. v. Wilkins*, 27 Maine, 345.

² *Robinson v. Mansfield*, 13 Pick. 139.

³ *Lewis v. Morse*, 20 Conn. 211.

(a) The plaintiff having, as sheriff, attached certain goods, the defendants, as attorneys for subsequent attaching creditors and for the debtors, being desirous of having the goods sold at private sale instead of at auction, agreed with the first attaching creditor, that they should execute to the plaintiff a receipt for the goods at a certain valuation, and should thereupon receive the goods and dispose of them as they desired. Accordingly the defendants executed and delivered to the plaintiff a writing, acknowledging the receipt of the goods from him, and agreeing to keep

them free of expense, and return them to him on demand, or pay the stipulated value; and they thereupon received the goods and disposed of them at private sale. Held, this was equivalent to the ordinary receipt; that it was a contract, and not a mere receipt; that trover could be maintained against the defendants for failure to return the goods on demand, and to pay the stipulated price; and that parol evidence was not admissible, to show that at the time the receipt was given the parties agreed that the defendants might sell the goods. *Brown v. Gleed*, 33 Verm. 147.

§ 6 *a*. A receiptor, if entrusted with the property without the agency of the creditor, is the agent of the officer, and for his torts or neglect the officer is liable.¹ His insolvency and consequent inability to respond to a demand of the property on the execution furnish no defence for the officer, even though the receiptor, when taken, was actually responsible, but afterwards became insolvent.² Nor can the officer rely upon the consent of the creditor's attorney that the officer may take receiptors, given generally, and, without naming any receiptors, or referring to the responsibility of those to be taken, and a request to the officer, that, before he removes the property he will go to the debtor, and see if he will furnish receiptors.³ But if, in defence of an action against a sheriff for a default of his deputy in not keeping property attached, it is proved that the plaintiff's attorney consented that the deputy might take a receiptor; it is erroneous to instruct the jury, that such consent "should have been expressed with the intent of influencing or controlling the officer's conduct, and of assuming the risk upon the plaintiff himself."⁴

§ 7. The approval, by a plaintiff, of the person taken as receiptor, does not exonerate the officer from making effort to find the property, that it may be sold on execution, or of bringing a suit upon the receipt.⁵ And a sheriff who attaches personal property, and leaves it in the possession of a receiptor, by whom it is delivered to the owner, who converts it to his own use; is estopped by his return of such attachment, when called upon to seize and sell the property on the execution, to deny that the property is in his hands, both as against the original attaching creditor, and as against the assignees of the debtor in insolvency, admitted to prosecute the suit under the provisions of an insolvent law.⁶

§ 8. When the receipt promises that the property shall be delivered "on demand;" a demand is necessary previous to commencing a suit on the receipt, notwithstanding the inability of the receiptor to redeliver the property.⁷ But, after demand, trover will lie against a receiptor,⁸ either by the sheriff, to whom the receipt is given, or in his name, for the benefit of those whose rights are to be affected. And where the receiptor has mortgaged

¹ *Gilbert v. Crandall*, 34 Verm. 188.

² *Austin v. Burlington*, 34 Verm. 506.

³ *Ibid.*

⁴ *Wright v. Willis*, 2 Allen, 191.

⁵ *Allen v. Doyle*, 33 Maine, 426.

⁶ *Bacon v. Lincoln*, 2 Cush. 124.

⁷ *Bacon v. Thorp*, 27 Conn. 251; *Bicknell v. Hill*, 33 Maine, 297. See *Phelps v. Gilchrist*, 8 Fost. 266.

⁸ *Webb v. Steele*, 13 N. H. 236.

the property to pay his own debts, a demand and refusal are not necessary, in order to sustain trover. The conveyance of the property is a conversion.¹ So where two receipt for property, and one of them converts it with the knowledge of the other, who does not interfere to prevent the conversion; a subsequent demand upon the latter, and a non-compliance with the demand, are competent evidence of a joint conversion.² So the receiptor's written acknowledgment, upon the receipt of a demand upon him, at a certain date, is sufficient evidence.³ (a) So the receiptor will be liable for a conversion, if he has destroyed the property by his own act, or, in case the property be live stock, if he has killed it by violence, or caused its death by cruel treatment, starvation, or want of ordinary care.⁴

§ 9. A receiptor, under some circumstances, may doubtless be liable to the debtor, as well as the officer or creditor. But where a receiptor, in a suit in one State, having taken the property to his residence in a neighboring State, there pointed it out to an officer, and permitted it to be attached, and taken from him, on a writ sued out by the plaintiff in the first action, returnable to the courts of that State; held, the receiptor was not liable in trover to the defendant, on the plaintiff's abandoning the suit in the former State.⁵

§ 10. In respect to the rights and liabilities of an officer, connected with the seizure, either upon attachment or execution, of property the title to which is doubtful, and more particularly which is not in the possession of the debtor; it has been held, that if a sheriff, upon the representation of the creditor, seized goods as belonging to the debtor, and damages are recovered against the sheriff by a third person, claiming the goods; an action upon the case lies, at the suit of the sheriff, against the creditor, although there were no fraud in the representation, or knowledge of its

¹ *Stevens v. Eames*, 2 Fost. 568; 13 N. H. 230; 10 Ib. 199.

² *Ibid.*

³ *Cargill v. Webb*, 10 N. H. 199.

⁴ *Cross v. Brown*, 41 N. H. 283.

⁵ *Chase v. Andrews*, 6 Cush. 114.

(a) As a creditor of two joint debtors has a right to secure his claim by attaching the property of both or either of them; where A, in a suit against B and C, directed the officer to attach the property of B, and not of C, which he did; and afterwards the officer put the property into the hands of D, and took from him a receipt, promising to redeliver such property on

demand, without informing D, of the direction given by A in relation to the attachment: in an action brought by the officer, on such receipt, against D, it was held, that such attachment was no violation of the rights of B or C, and that the want of such information to D was not a constructive fraud. *Marion v. Faxon*, 20 Conn. 486.

falsehood.¹ So, that the plaintiff pointed out certain property to the sheriff to be levied upon, is a sufficient offer of indemnity, unless objected to at the time, to oblige the sheriff to pursue the plaintiff's instructions, unless he can show that they were clearly unreasonable. And, if he does not pursue them, he may be ruled for the damages caused by that failure.² (a)

§ 11. But, on the other hand, it is held, that the law will not imply an indemnity to the officer, if he attach property not in possession of the debtor without special orders; and therefore he is not bound to attach such property, unless specially requested by the creditor or his attorney.³ Nor is a sheriff liable, for failing or refusing to levy on, or after levy to sell, disputed property, unless he is indemnified. And his return as to the facts is evidence

¹ *Humphrys v. Pratt*, 5 Bligh N. R. 154.

² *Weld v. Chadbourne*, 37 Maine, 221;

³ *Mullings v. Bothwell*, 29 Geo. 706; *Shriver v. Harbaugh*, 37 Penn. 399.

Levy v. Shockley, 1b. 710.

(a) Where a sheriff levies on property, with notice of an adverse claim, under a promise by the plaintiff to indemnify him before the sale; the sheriff is liable for the property, if it belonged to the execution defendant, although the plaintiff has not indemnified him, where no demand of indemnity has been made. *Miller v. Commonwealth*, 5 Barr, 294.

A laborer, who had a lien for helping to drive the logs of several owners intermingled together, in order to enforce his lien, attached a part of them, and seasonably delivered the execution to the officer, who refused to sell them. Held, as the officer did not show that he would have been required to take the property of one person to pay the debt of another, or to do any unlawful act, he was liable for such refusal. *Doyle v. True*, 36 Maine, 542.

A sheriff is bound to levy a mortgage *fi. fa.* on the mortgage property described in the process, even though in the possession of a third person holding adversely to the mortgagor. *Wallace v. Holly*, 13 Geo. 389.

A sheriff, being about to make an attachment, omitted to do so, in consideration of a bond given by the defendant in the suit, conditioned to save him harmless, and to pay the judgment which might be recovered. In a suit brought by the plaintiff in the original action upon this bond; held, it was given to indemnify the sheriff against a breach of his official duty, and was therefore invalid from considerations of public policy, and could not be enforced either by

the sheriff himself or by the plaintiff. *Cole v. Parker*, 7 Clarke (Iowa), 167.

Whenever an officer, in good faith, and in the exercise of his official discretion, doubts whether personal property levied upon by him under execution is subject to levy or sale, the law gives him the right to demand the bond of indemnity required by § 709 of the (Kentucky) Civil Code. *Board v. Helm*, 2 Met. (Ky.) 500.

A sheriff, paid out of the proceeds of sale of real estate, sold on execution, the amount of a judgment which was supposed to be a lien, and took from the judgment creditor a refunding receipt; the money was subsequently recovered from him by other parties, on the ground that the judgment was not a lien; and the sheriff brought suit to recover back the money paid. Held, it was a good defence, that the sheriff had purchased other real estate from the defendant in the execution, on which this judgment was clearly a lien, and had agreed to pay it off as a part of the consideration. *Morrison v. Mullin*, 34 Penn. 12.

The sheriff's return upon an execution showed, that process had not been served on the party whose property had been seized by him, but on another person of the same name, and that the levy was made with the understanding that he was to be indemnified by the plaintiff before selling. Upon motion for a rule against the sheriff to compel him to make the sale, held, he was justified in doubting whether the property was subject to the execution, and in demanding of the plaintiff a bond of indemnity. *Board v. Helm*, 2 Met. (Ky.) 500.

for him, to be considered by the jury with the other evidence in the cause. Nor is it necessary that he should notify the plaintiff or demand indemnity.¹ Thus, if a sheriff levies upon goods as the property of A, in which B claims a partnership, and the plaintiff refuses, upon request, to indemnify the sheriff; he may either return the writ *nulla bona*, or refuse to sell anything but the interest of A.² So where a sheriff has reason to doubt whether goods are the property of a debtor, he may insist on the creditor's showing them to him, and also on being indemnified for attaching or levying upon them. But if, without making any such claim, he undertakes to execute the precept as well as he can, he is answerable for not attaching the debtor's goods when in his power to do so.³

§ 12. A precept against one person, as has been seen (chap. 29, §§ 5, 32), does not justify the officer in attaching the goods of another. Thus the wrongful attachment of goods in the hands of a bailee, and taking from him a forthcoming bond for their delivery, is such a conversion, as will support an action of trover by the owner against the sheriff.⁴ But it is held, that an officer attaching goods of a third party is not liable, without notice of the claim to the goods, and a demand for them; even though he was indemnified before seizing the goods. And a conversation between the claimant and the officer's bailee cannot be held as notice.⁵ So, if the goods of a stranger are in the possession of a debtor, and so mixed with those of the debtor, that the officer, on due inquiry, cannot distinguish them; the owner can maintain no action against the officer for taking them, until notice, and a demand of his goods, and a refusal or delay of the officer to redeliver them.⁶

§ 13. In trespass against an officer, for attaching property of the plaintiff, in an action against him which was not sustained; he is not estopped to show that the property belonged to him, although at the time of the attachment he declared it belonged to a stranger; the plaintiff having acquired no advantage, and the officer having sustained no damage, by such declaration.⁷ And, on the other hand, in an action of trespass against an officer, for taking and carrying away goods, which he has attached

¹ *Shriver v. Harbaugh*, 37 Penn. 399; *State v. Sharp*, 2 Sneed, 615. See *Green v. Hackley*, 3 Met. (Ky.) 386; *Connelly v. Walker*, 45 Penn. 449.

² *Patterson v. Anderson*, 40 Penn. 359.

³ *Bond v. Ward*, 7 Mass. 123.

⁴ *Abercrombie v. Bradford*, 16 Ala. 560. See *Simpson v. Watrus*, 3 Hill. 619.

⁵ *Taylor v. Seymour*, 6 Cal. 512.

⁶ *Bond v. Ward*, 7 Mass. 123.

Stedman v. Perkins, 42 Maine, 130.

⁷ *Wallis v. Truesdell*, 6 Pick. 455.

and claims to hold as the property of the plaintiff, the officer is not estopped to deny the property of the plaintiff.¹

§ 14. The liability of the officer, for failing to make an attachment, involves a corresponding power to do whatever may be necessary for the execution of this precept. Thus if a person, having in his store the goods of the defendant named in a writ, refuses to permit an officer to enter the store for the purpose of attaching the goods, the officer is justified in breaking it open for such purpose.² (a) And if the goods of a debtor are secreted in the store or warehouse of a third person, the officer may, even in the night, break open the outer door for the purpose of seizing them, after an unsuccessful demand of admittance upon one having the key, however he may have come in possession of it.³ But when boxes at a depot for transportation contain attachable articles, the officer is not authorized to remove the boxes from the depot unnecessarily, for the purpose of attachment; though he may take possession of, and open the same, and attach any property liable therein.⁴ So, if an officer would take goods belonging to A and in A's possession, upon a writ against B, A may maintain his possession by force, in the same manner as he might against any other trespasser.⁵ And if an officer attaches property not liable to attachment, he is a trespasser;⁶ and an action of trespass lies against him.⁷ (b) So, in an action against an officer, for attaching the property of the plaintiff in a suit against another person, the defendant cannot justify under the writ, even though there may be grounds of justification, without showing, that, if then returnable, it has been duly returned.⁸

§ 15. An attachment does not change the ownership of property. The officer is the agent of both parties, and may be liable

¹ Roberts v. Wentworth, 5 Cush. 192.

² Platt v. Brown, 16 Pick. 553.

³ Burton v. Wilkinson, 18 Verm. 186.

⁴ Feeler v. Stebbins, 26 Verm. 644.

⁵ Commonwealth v. Kennard, 8 Pick. 133.

⁶ Foss v. Stewart, 2 Shep. 312.

⁷ Bean v. Hubbard, 4 Cush. 85.

⁸ Russ v. Butterfield, 6 Cush. 242.

(a) The assistants of a sheriff's officer, for the purpose of executing a *fi. fa.*, illegally entered the plaintiff's premises on Sunday, by breaking open a window, but, by the officer's direction, abandoned possession on the Monday following. On the Thursday after, the officer himself entered the same premises to execute a distress warrant, and seized goods. Held, he might

sell the goods. Percival v. Stamp, 24 Eng. L. & Eq. 399.

(b) This is the proper form of action at common law; but since the statute of Massachusetts, 1839, ch. 151, § 4, providing that "in all actions on the case it shall be no objection to maintaining such actions that but for this act the form thereof should have been trespass;" trover will equally well lie. Davlin v. Stone, 4 Cush. 359.

to either. (a) But if the property is lost, without the neglect of the officer or the plaintiff, the loss must be sustained by the defendant, who has failed to pay the amount due. A plea, therefore, that property was *attached and lost*, is defective, in not showing how the loss occurred.¹ Where final judgment is rendered in favor of the defendant, trover will not lie against the attaching officer, a deputy sheriff, for neglect, in not keeping and taking suitable care of the property.² Nor, as between the owner of goods and an officer, will replevin lie for property in the hands of the latter by virtue of an attachment, unless exempted from execution or attachment.³ And in order to sustain an action for an *excessive* attachment, the allegation and proof must be substantially the same as in a suit for a malicious action, that is, want of probable cause and express malice; and the attaching creditor will ordinarily be the only person liable to such action. And, on the other hand, the general rule is laid down, that an attaching creditor can in no case be held jointly liable with the officer for any wrong committed by the officer, unless he in some way participated in the wrong, or ratified and confirmed it, after becoming aware of it.⁴ (b)

§ 16. We have already had occasion (vol. 1, p. 105) to consider the general doctrine of *trespass ab initio* (c), whereby the subsequent

¹ *Star v. Moore*, 3 McLean, 354; acc. *Conway v. Nolte*, 11 Mis. 74.

² *Abbott v. Kimball*, 19 Verm. 551.

³ *Kevser v. Waterbury*, 7 Barb. 650.

⁴ *Abbott v. Kimball*, 19 Verm. 551.

(a) An officer, holding a process against several *joint* parties, is not bound to regard the equities subsisting among the debtors, nor can he be subjected to a suit in favor of a co-obligor or surety, for any default in enforcing an execution against the principal debtor. *Rutland v. Paige*, 24 Verm. 181.

(b) A sheriff who makes an excessive attachment of property, then sells on execution more than is sufficient to satisfy the judgment, returns a small part of the property to the parties claiming it, but in very damaged condition, and retains in his hands the surplus of the proceeds of the sale on execution, is liable for the surplus and for the damage in an action brought by a purchaser of the property, prior to the attachment, whose title is in fraud of creditors and void as to them. *Waterbury v. Westervelt*, 5 Seld. 598.

B, as constable, attached the joint property of A and S, on writs against both.

The property was appraised without notice to A, and S deposited with B the appraised value, and received the property. The suit resulted in A's favor, and, after demanding the property of B, A brought trover for it. Held, that this was not equivalent to a public sale of the whole property; nor was B guilty of a conversion; and that a delivery to S was to all intents a delivery to A. *Gassett v. Sargeant*, 26 Verm. 424.

Replevin will not lie against an officer, who, having levied upon and taken goods in execution, receives from the defendant the amount due on the execution, and then refuses to redeliver the goods. *Gardner v. Campbell*, 15 Johns. 401.

(c) "The general rule is in the *Six Carpenters' case* (8 Co. 146 a); where there is an authority given by law for doing an act, there an abuse may turn the act into a *trespass ab initio*. The rule is said to rest upon this—that the subsequent illegality

abuse of an authority conferred by law subjects a party to an action for an act originally justifiable. Upon this principle, if, on attachment of goods, the officer continue in possession of the defendant's house, or keep the goods therein, for a long and unreasonable time, instead of removing them to a place of safe custody; he is a trespasser *ab initio*.¹ (a) So an officer, who enters a house by authority of law, and attaches goods therein, becomes a trespasser *ab initio*, by placing there an unfit person, as keeper of the goods, against the remonstrance of the owner of the house.² So in case of sale, after appraisalment by an interested person, the officer is a trespasser *ab initio*.³ So where an officer sells property attached, without pursuing the provisions of the statute on that subject, and the defendant prevails in the suit; the officer becomes a trespasser *ab initio*, and is liable to an immediate action, without any previous demand on him for the chattels.⁴ And though the suit on which the property is attached is still pending.⁵ (b) So a purchaser, in fraud of creditors, may maintain an action against an officer, who has attached the goods upon a writ against the vendor, if by the illegal sale thereof the officer has become a trespasser *ab initio*; although, at the time when the action was commenced, the officer's proceedings had all been regular and legal.⁶ So, if property attached be used by the officer, he thereby becomes a trespasser *ab initio*, and is liable *prima facie* for its full value; but, if it be received back by its owner, or legally disposed of

¹ Reed v. Harrison, 2 W. Black. 1219.

² Malcom v. Spoor, 12 Met. 279.

³ McGough v. Wellington, 6 Allen, 505.

⁴ Wallis v. Truesdell, 6 Pick. 455.

⁵ Ross v. Philbrick, 39 Maine, 29.

⁶ McGough v. Wellington, 6 Allen, 505.

shows the party to have contemplated an illegality all along, so that the whole becomes a trespass." Per Littledale, J., Smith v. Egginton, 7 Ad. & Ell. 176; 6 Dowl. P. C. 38. See *Trespas*.

(a) So it is held in Massachusetts, in virtue of certain statutory provisions, that a mortgagee or pawnee of goods in a store, who has taken possession of the store and goods, with the consent of the mortgagor or pawnor, cannot maintain an action of trespass against an officer, for entering the store for the purpose of attaching the goods, at the suit of a creditor of the mortgagor or pawnor, unless the officer keeps possession of the store for an unreasonable length of time, so as to make himself a trespasser *ab initio*. Rowley v. Rice, 11 Met. 337.

If a judgment debtor, whose property

has been attached on mesne process, has paid the judgment, and informs the officer thereof, and demands his property within thirty days from judgment; and the officer, without asking for delay, or authority from the judgment creditor, replies that it is lost and he cannot deliver it up: this is a waiver of any right to further time. Dorman v. Kane, 5 Allen, 38.

(b) A sale of attached property by a sheriff, under order of a county court judge, issued in vacation, ought to be reported by the officer and confirmed by the circuit court; and § 255 (Kentucky) Civil Code expressly confers this right of confirmation, as well in cases of sales during the pendency of the action as after judgment; and if the sale be not so reported and confirmed, it may afterwards be set aside by the court. Greer v. Powell, 3 Met. (Ky.) 124.

upon the execution, the officer is liable only for the damages occasioned by such use.¹

§ 16 *a*. But an officer or authorized person, who has regularly attached personal property in a suit against the owner, will not be liable to the latter in trover, for a mere neglect to take proper care of the property while under attachment; neither will such neglect render him a trespasser *ab initio*. The proper remedy is a special action on the case.² And, in an action by the defendant against the officer for an irregular sale, the burden of proof is on the plaintiff.³ So where property attached is sold by the officer upon the writ, in pursuance of a statute, and judgment is finally rendered in favor of the defendant; a refusal, on the part of the officer, to pay to the defendant the amount for which the property was sold, will not make him a trespasser *ab initio*, so as to render him liable in trover. The only proper action against the sheriff, is for money, and in that action the attaching creditor cannot be joined, unless he has been jointly concerned in the detainer.⁴ Nor can an officer be made a trespasser for attaching property, by any irregularity in the proceedings of another officer in selling the property upon execution.⁵ So an officer cannot be held liable, as a trespasser *ab initio*, for using personal property attached by him, unless the property have been injured, or used by him for his own benefit, or for the benefit of some one other than the debtor. As where an officer attached a horse, wagon, and harness, and immediately put them to use in removing other personal property of the debtor, attached by him at the same time, and they were not thereby injured.⁶ So where the officer, on the day subsequent to the attachment, was seen driving the horse and wagon in the highway, but it did not appear for what purpose; the jury may infer, from the time and circumstances, that he was removing them, for the purpose of securing them in a convenient place for keeping them while subject to the attachment.⁷

§ 17. It is in general provided by express statute, that the lien of an attachment shall cease, unless, within a certain time after judgment in the suit, execution be levied upon the property. With reference to this statutory requirement, a deputy sheriff, in Maine, who has attached personal property, is bound to keep

¹ Collins v. Perkins, 31 Verm. 624.

² Nutt v. Wheeler, 30 Verm. 436.

³ Duncan v. Matney, 29 Mis. 368.

⁴ Abbott v. Kimball, 19 Verm. 551.

⁵ Paul v. Slason, 29 Verm. 231.

⁶ Ibid.

⁷ Ibid.

it thirty days after judgment, and to deliver it to the officer holding the execution at the expiration of that time, on demand, though in the mean time he has ceased to be a deputy.¹ (a) So a sheriff, who has attached property by leaving a copy with the town clerk, is bound to use ordinary care to see that it is forthcoming to answer the judgment;² although he took a receipt of the property from the nominal plaintiff and another.³ But in an action against an officer, for not keeping attached property so that it could be levied upon, it must appear from the declaration, that the property was charged in execution within thirty days from the rendition of judgment.⁴ And an attachment is not conclusive of the officer's obligation to levy an execution upon the property. Thus an officer, directed to "attach property or make no service," attached certain property, which was alleged in the return to belong to the debtor. In an action against him for not seizing it on execution, he may prove in defence that it was not the property of the debtor.⁵ Though the discharge of the execution, during the pendency of an action against a sheriff for not properly keeping property attached, is merely in mitigation, and nominal damages may be recovered.⁶ And the officer, being responsible for the goods attached as well to the debtor as to the creditor, is not bound to deliver them to the latter, who has taken out execution, so that he may procure his execution to be levied upon them.⁷ So it is not the duty of the sheriff, who has attached property, to take out execution after judgment; and if, in such case, the plaintiff neglects to take out execution within a reasonable time, neither the sheriff, nor his sureties, will be liable for the forthcoming of the property attached.⁸ So a demand within thirty days from judgment is indispensable to fix his liability, unless special facts supersede the necessity of a demand. Thus, if the property is such as cannot be removed, but the officer

¹ Smith v. Bodfish, 39 Maine, 136.

² Smith v. Church, 1 Williams, 168.

³ McKOrmsby v. Morris, 3 Williams, 417.

⁴ McKOrmsby v. Morris, 2 Williams, 711.

⁵ Canada v. Southwick, 16 Pick. 556.

⁶ Brown v. Richmond, 1 Williams, 583.

⁷ Blake v. Shaw, 7 Mass. 505.

⁸ Snell v. Allen, 1 Swan, 208.

(a) The distinction is adopted in Massachusetts, that, where an *equity of redemption* is attached, it is the duty of the officer, upon receiving the execution within thirty days after judgment, to levy on the equity without particular instructions; but that it is otherwise where the land itself is attached. And where "all the right, title,

and interest" of the debtor, in land which proved to be under mortgage, was attached; it was held that the officer, having no instructions to levy on the equity, was not liable for neglecting to do so, unless he knew that he had attached an equity only. *Start v. Sherwin*, 1 Pick. 521.

neglects to file in the town clerk's office a certificate, as the statute requires, or to keep actual possession; he is released from liability to the creditor, if the latter neglect seasonably, on execution, to demand the property, although it had been sold pending his suit, on an execution in favor of another creditor.¹ So if, upon the sale of attached property upon a writ, the money received was put into the hands of the creditor, who, after obtaining judgment and taking out execution, refused to pay over the money to the deputy who had the execution, so that it could be applied thereon, and the execution was returned in no part satisfied; the lien obtained by the attachment is dissolved at the expiration of thirty days; and a subsequent attaching creditor, who has obtained judgment and execution, becomes entitled thereto, and may maintain an action against the sheriff, if, upon committing the execution to him for service, the property is not found, or the avails of it applied thereon.² So, where an execution is delivered to an officer to serve, and no instructions are given him, he has a right to presume that it issued on the day when the judgment was rendered, and that he has the whole sixty days allowed by the execution for its service and return. Where, in such circumstances, an officer made demand on receiptors for personal property attached, within the time allowed by the terms of the execution for its service and return, but after the lien of the attachment had expired by the lapse of sixty days from the time of the judgment, the execution having been issued some time after judgment, but no information of that fact having been given to the officer; held, he was not chargeable with official negligence. And this, although the debtor had become insolvent before judgment, and the execution could be collected only out of the attached property, and this was known to the officer.³ So, although the goods attached were delivered to a keeper, upon his accountable receipt, and by him restored to the debtor, and afterwards demanded of the officer upon execution, but not within thirty days from judgment; the officer is not liable for not delivering them. But where the goods so attached were tools of trade, and the debtor brought an action of trespass against the officer for attaching them, and recovered judgment for their value; and the plaintiff, having agreed to indemnify the officer, defended the action and satisfied the judgment: it was

¹ *Wetherell v. Hughes*, 45 Maine, 61.

² *Dayton v. Lynes*, 31 Conn. 578.

³ *Morse v. Knowlton*, 5 Allen, 41.

held that the officer was liable to the plaintiff for the goods, for by the judgment and satisfaction the property became vested in the plaintiff.¹

§ 18. Where an officer attaches property, and within thirty days after judgment receives the execution, but neglects to seize and sell such property; and, before the return day of the execution, the debtor dies insolvent, and the officer returns the execution unsatisfied; he is liable to the creditor for his neglect.² But an officer, who delivers property, held by him under attachment, to an assignee in insolvency of the debtor, upon demand made while the assignment is in force, is not liable therefor to the attaching creditor, in case the proceedings in insolvency are subsequently annulled, for want of notice to the debtor of the petition by which they were instituted.³ (a)

§ 19. The same property may be successively attached by different creditors, (b) any one of whom may maintain an action against the sheriff for an injury occasioned by his default in relation to the property. (c) In general, the officer must first serve

¹ Howard v. Smith, 12 Pick. 202.

² Penniman v. Freeman, 3 Gray, 245.

³ Barnard v. Ward, 9 Mass. 269.

(a) Where an officer has attached goods, and within thirty days after judgment seized them in execution, but failed to sell them; another officer may lawfully seize them, on another execution, in the hands of the bailee of the first officer, notwithstanding he had notice of the first seizure. Warren v. Leland, 9 Mass. 263.

(b) See Gordon v. Jenney, 16 Mass. 465. In reference to property taken on successive executions, where the sheriff is sued for selling the same personal property a second time, on a different execution, he is not estopped from giving evidence of fraud on the first sale. The sheriff, in making a sale, is but the instrument of the law; and the execution creditor, who had the property sold the second time, has a right to show that the first sale was collusive. McMichael v. McDermott, 17 Penn. 353.

(c) See Pailhes v. Thielen, 1 La. An. 34; Ross v. Weber, 26 Ill. 221. A wrongful act of the officer may also avoid a prior writ as against a subsequent attachment. Thus where a deputy-sheriff, having in his hands a writ of attachment, by direction of the creditor's attorney, but not in his presence, alters the date and return day of the writ, and attaches upon it property of the debtor; the writ is void as against a subsequent attaching creditor. Clarke v. Lyman, 10 Pick. 45.

If an officer attaches personal property, and it is subsequently taken from his possession by another officer, having another writ of attachment against the same debtor, and the property is sold, and its avails applied by the second officer upon the execution obtained in the second suit; judgment can be obtained for no more than nominal damages, in a suit brought in the name of the first officer against the second officer for such taking, if the first attaching creditor have neglected to take out execution within sixty days after final judgment in his suit. Nor can the plaintiff recover, upon the ground of any liability, on his part, to the debtor; since the act of the second attaching officer, in taking the property, was justifiable, so far as the debtor was concerned; and the debtor may have an action upon the case, in his own name, for any injury to the property itself, notwithstanding the special property and exclusive possession in the first officer might prevent the debtor from bringing trespass. Neither is the first officer, in such case, entitled to recover actual damages, to the time when the lien was abandoned, for the purpose of indemnifying him against the expenses, to that time, of the action of trespass; since it is very unusual, in any case, to give damages beyond the actual value of the property, as against a second

the writ first given him.¹ But, in order to support an action, an attaching creditor must show that he has suffered *directly* from the act complained of. Thus the first of several attaching creditors obtained a judgment, in which were included illegal fees charged by the sheriff, to such amount, that the property attached was not sufficient to satisfy the executions, which issued on attachments prior to the plaintiff's, and his own also. The plaintiff brought an action on the case against the sheriff, to recover the amount of the illegal fees. Held, he could not recover.² But one creditor may maintain an action against the officer for a false return upon the writ of another, by which he is injured. Thus, where an officer, having attached an equity of redemption, sells it on execution, without having given notice of the *place* of sale, but falsely returns that he has given such notice, in consequence of which return a subsequent attaching creditor, being unable to sell the equity of redemption, is prevented from obtaining satisfaction of his demand; the officer is liable to such creditor in an action for the false return; and the measure of damages is the debt and interest, if the value of the property attached amounts to so much.³

§ 20. If an officer, having attached goods of a debtor, suffers them to remain intermingled with other goods of the debtor, and makes claim to the whole, so that another officer, having a writ

¹ Moore v. Fitz, 15 Ind. 43.

² Whitaker v. Sumner, 9 Pick. 308.

³ Turner v. Norris, 35 Maine, 112.

attaching officer, and the second attaching officer may require indemnity, if he please, before making the attachment; and, in such case, the costs recovered are the taxable costs, and not those between attorney and client, as allowed in some other cases of indemnity. Goodrich v. Church, 20 Verm. 187.

Where the goods of one are attached and taken by the officer on a writ against another, and afterwards again attached and taken in the same manner on a writ in favor of a different creditor; a release by the owner of all claim to damages, in consequence of the second attachment, in consideration of its relinquishment, has no effect upon a suit to recover damages occasioned by the first taking. Weston v. Dorr, 12 Shep. 176.

Where two officers at nearly the same

instant took possession of property, each claiming to have attached it, and a contract was made between them to settle this dispute by a division of the property; it was held, that the contract was upon good consideration, and binding upon them, however it might be upon the creditors. Also, that such agreement (that each should have a moiety of the goods) would preclude them from afterwards raising the question of priority. And, though they in fact became tenants in common of the goods, as between themselves, yet, if one seized and sold the whole of the goods on his executions (both acts of creditors having taken the necessary measures to charge the goods in execution), the other officer can sustain trover, without showing that he in fact made the first attachment. Lyman v. Dow, 25 Verm. 405.

against the same debtor, cannot distinguish which have been attached; the latter officer may attach the whole.¹

§ 21. Where a sheriff, to whom a writ of attachment is delivered, has directions from the creditor to attach certain chattels of the debtor, he is not bound to attach, on the same writ, other property, afterwards shown him by another creditor, with directions to attach the same on his suit.²

§ 22. If A's personal property is attached in a suit against B, and A sells and assigns his property to C while it is under attachment, an action of trespass, for the benefit of C, against the attaching officer, is properly brought in the name of A.³

§ 23. Where goods under attachment are assigned by the owner, and then again attached by the same officer, the delivery of the instrument of assignment is a sufficient delivery of the goods; and the assignee, having paid the claim of the first attaching creditor, may, upon giving the officer notice of such payment, and of the assignment, and demanding possession of the goods, maintain *replevin* therefor against him.⁴

§ 24. The liability of a sheriff, for the doings of his *deputy* (see chap. 29, § 21), in relation to an attachment, is limited to the acts of the deputy done while the relation between them continues. Thus, where the deputy of a former sheriff had attached goods, and afterwards, — being the deputy of the present sheriff, — refused to serve the execution upon them, the former sheriff was held not liable.⁵ But where a deputy sheriff, who had attached personal property, ceased to be a deputy before judgment, but the execution was put into his hands as coroner, with orders to satisfy it from the property attached; the coroner having neglected to make this application of the property, it was held, in an action against the sheriff for such neglect, that his return as coroner on the execution, so far as it related to a demand of the property, was admissible in evidence.⁶ And the sheriff may be answerable upon a *contract* of the deputy in relation to property attached. Thus a deputy sheriff, having attached goods in a suit brought by F against M, sold them on *mesne process*, pursuant to statute, and held the proceeds. M died, and his administratrix, and F, and A,

¹ *Sawyer v. Merrill*, 6 Pick. 478. See *Robinson v. Holt*, 39 N. H. 557.

² *Goddard v. Austin*, 15 Mass. 133.

³ *Holly v. Huggeford*, 8 Pick. 73.

⁴ *Whipple v. Thayer*, 16 Pick. 25.

⁵ *Blake v. Shaw*, 7 Mass. 505.

⁶ *Smith v. Bodfish*, 39 Maine, 136.

a creditor of F, executed an indenture, in which it was agreed that the deputy should pay (and he was therein directed and requested to pay) part of said proceeds to M's administratrix, and the residue to A, and that F's suit against M should be dismissed. The deputy paid M's administratrix accordingly, and made part payment to A, and the suit was dismissed; but he neglected to pay A in full. M's administratrix thereupon sued the sheriff, for the deputy's default in not paying over the balance of the proceeds. Held, that the sheriff was answerable to her for this default of the deputy.¹ So where a debtor and his attaching creditors agree in writing, that the goods may be sold by the deputy sheriff who attached them, either at public or private sale, at his discretion, and the proceeds held to respond the judgments, and the deputy sells the goods, partly at private and partly at public sale, and receives the money therefor, but neglects to apply it in satisfaction of executions issued on the judgments, and seasonably put into his hands; the sheriff is answerable.²

§ 25. A statute, which provides, that "actions of trespass and trespass on the case for damages done to real or personal estate" shall survive; applies to an action of trespass on the case against a sheriff, for the fault of his deputy in not keeping property attached, and not delivering it to the officer holding the execution.³

§ 25 a. An action against a sheriff, for a wrongful attachment by his deputy, is not defeated, by proof that the plaintiff has claimed damages for the same act, in his answer to a suit by the attaching creditor against him, if it does not appear that the matter was adjudicated in that suit, or that evidence was introduced respecting it.⁴

§ 26. After an attachment of goods, and pending the action, the defendant died; his administrator took upon him the defence of the action; judgment was rendered against the administrator, and execution thereon delivered to the officer, who delivered up the goods to the administrator. The latter included them in his inventory; and, on settling his account of administration, the Judge assigned to the widow all the effects that remained after paying funeral charges, &c. No representation of insolvency was made. Held, the officer was liable to the judgment creditor for the value of the goods attached.⁵

¹ *Mansfield v. Sumner*, 6 Met. 94.

² *New Hamp. Savings Bank v. Var-
num*, 1 Met. 34.

³ *Dana v. Lull*, 21 Verm. 333.

⁴ *Clapp v. Thomas*, 5 Allen, 158.

⁵ *Rockwood v. Allen*, 7 Mass. 254.

§ 27. In regard to the seizure, either by attachment or upon execution, of property specially *exempted* from such liability; (a) it is held, that trover in common form will lie against a constable, for the seizure and sale by execution of chattels exempt from execution; and the plaintiff need only allege a right of property and possession, without a special allegation of the facts which must appear to entitle him to recover.¹ But trespass cannot be maintained against an officer, for selling property on execution by virtue of an attachment, on the ground that the property was exempt from attachment and seizure, without showing that it was exempt at the time of the attachment.² So where, in a foreign attach-

¹ *Hawkins v. Pearcy*, 11 Humph. 44.

² *Greaton v. Pike*, 34 Maine, 233.

(a) See *Daniels v. Hayward*, 5 Allen, 43; *Clapp v. Thomas*, 5 Allen, 158; *Rayner v. Whicher*, 6 Allen, 292; *Johnson v. Babcock*, 8 Allen, 583; *Greenleaf v. Sanborn*, 44 N. H. 16; *Reed v. Neale*, 10 Gray, 242; *Gibson v. Gibbs*, 9 Gray, 62.

Where charcoal in the pit was attached, a part of which was entirely completed, so as not to require any further attention or labor, and the residue of which had so far progressed in the process of manufacture as to have been entirely burnt to coal, although some labor and skill were still necessary in order to separate and preserve it properly; it was held, that if a sheriff, holding a writ of attachment against the owner, saw fit to attach and take possession of the coal, and run the risk of being able to keep it properly, he had the right to do so. Also, that if any portion of the coal so attached were consumed through the want of proper care and attention on the part of the officer, the plaintiff could not sustain trespass against the officer to recover for such nonfeasance, and that the attaching creditor was not liable therefor, unless the omission were by his command or assent. *Hale v. Huntley*, 21 Verm. 147. See *Wilds v. Blanchard*, 7 Ib. 138.

Under Massachusetts Gen. Sts. c. 133, § 32, machines of simple construction, moved by the hand or feet, and used in the manufacture of boots, are exempt from attachment, although the owner employs a number of men under him in carrying on the business, by whom the machines are generally used. *Daniels v. Hayward*, 5 Allen, 43.

A violin and bow of a debtor, whose sole business is that of a musician, as a member of a military and quadrille band, and who obtains most of his support by playing upon his violin, are exempt from attachment, if the value of all his musical instru-

ments is less than one hundred dollars. *Goddard v. Chaffee*, 2 Allen, 395.

If a debtor owns one cow, not subject to mortgage, and is in possession of another, which is mortgaged, the former is exempt from seizure on execution. *Tryon v. Mansir*, 2 Allen, 219.

Under Massachusetts Gen. Sts. c. 133, § 32, a sewing machine of less than \$100 in value, owned by one engaged in the manufacture of ready-made clothing, and used by a person employed by him, is exempt from attachment, as necessary, if without it such business cannot successfully be carried on, although the owner does not know how to use it himself. *Dowling v. Clark*, 3 Allen, 570.

If a debtor, who has a larger quantity of any kind of provisions than the law exempts from attachment, set apart no portion thereof for the use of his family before it is about to be attached, and makes no claim to any portion of it when the officer is about to attach the whole; he cannot maintain an action against the officer who takes the whole. *Clapp v. Thomas*, 5 Allen, 158.

The burden of proof is on a plaintiff, who seeks to recover of an officer for attaching provisions, which he claims are exempt from attachment, to prove facts which make them exempt. *Ibid.*

In Minnesota, where property is exempt, the officer may take it and make an inventory and appraisement. *Tulitis v. Orthwein*, 5 Min. 377.

In New Jersey, where the value is clearly within the amount exempted, the officer is liable; if doubtful, he may take the property subject to an appraisal. *Bonnel v. Dunn*, 4 Dutch. 153.

An execution sale of property exempt from attachment, after notice that the owner claims an exemption, passes no title. *Johnson v. Babcock*, 8 Allen, 583.

ment, a person disclosed that he had in his hands certain specified articles belonging to the principal defendant, and was thereupon adjudged trustee, and an execution was issued against the effects of the principal in the hands of the trustee, and levied on these articles; held, that an action of trespass against the officer, on the ground that the articles were by law exempted from attachment and execution, would not lie.¹

§ 28. With regard to the amount of *damages* to be recovered against an officer, on account of his default in relation to an attachment; in an action for neglecting to keep goods attached so that they might have been taken in execution, although the officer has neglected his official duty, yet if, in case he had adhered to it, the plaintiffs would have derived no benefit from their attachment, they are entitled to nominal damages only.²

§ 29. The discharge of the execution, pending an action against a sheriff for not properly keeping property attached, is merely in *mitigation*, and nominal damages may be recovered.³

§ 30. The rights and liabilities of an officer are more generally brought in question in connection with the *execution*, which, unlike attachment, is a common-law process, than in any other form. Thus, in addition to the ordinary liability of an officer to the parties to the suit, it is held, that, if the purchaser at a sale on execution loses his title to the property, in consequence of a neglect of the officer to comply with the requisitions of the law, he has a remedy by an action on the case against the officer. And, in such case, the sheriff is answerable for the default of his deputy.⁴ (a)

§ 30 a. Mere silence on the part of a sheriff, as to the existence in his hands of a prior lien on property sold in his presence, will not subject him to an action of deceit. Otherwise, if he does or says anything intended or calculated to mislead a purchaser in this respect. And inquiring from the sheriff, and reliance on his information, as to the nature of the liens and levies of executions in his hands, on property offered for sale in his presence, is certainly the exercise of reasonable caution and diligence, as this is a matter peculiarly within his knowledge.⁵

¹ *Haskell v. Sumner*, 1 Pick. 459.

⁴ *Sexton v. Nevers*, 20 Pick. 451.

² *Rich v. Bell*, 16 Mass. 294.

⁵ *Wicker v. Worthy*, 6 Jones, 221, 500.

³ *Brown v. Richmond*, 1 Williams, 583.

(a) In Kentucky, the purchaser of property, sold under an illegal levy, the execution being returned satisfied, should have the proceedings quashed before he proceeds against the sheriff. *Hamilton v. Vail*, 2 Met. (Ky.) 511.

§ 31. As in case of attachment, trover will lie against an officer, who takes, upon an execution, property exempted by law from attachment.¹ And both the officer and creditor are liable.² But not where there has been a *waiver* of the exemption.³ And the burden of proof is on the claimant.⁴ And where certain articles, to be selected by the owner, are exempted from execution, and an officer seizes and sells them, trespass will not lie against him, unless at the time of the levy, or within a reasonable time thereafter, the plaintiff selected the property and notified the officer thereof.⁵ (a)

§ 32. The levy, carrying away, and sale of a plaintiff's goods, although taking place upon different days, constitute but one act of trespass, and the plaintiff cannot be put to his election as to which he will proceed upon.⁶ (b)

§ 33. A sheriff may become a trespasser *ab initio* by any abuse of his authority under an execution. Thus the sale, by an officer, of the entire property in goods owned by two jointly, under an execution against one of them, is an abuse of his legal authority, which renders him liable as a trespasser *ab initio*.⁷ (c) So an officer who takes property on execution, but afterwards refuses the defendant his right of selection and appraisal under the exemption acts, becomes a trespasser *ab initio*; although evidence that the debtor had other property, exceeding that amount in value, which he fraudulently withheld from levy, may be given in mitigation of damages.⁸ But an officer cannot be charged as a

¹ Sanborn v. Hamilton, 18 Verm. 590. See Bonnel v. Dunn, 5 Dutch. 435.

² Bonnel v. Dunn, 4 Dutch. 153.

³ Berland v. O'Neal, 22 Cal. 504.

⁴ Tuttle v. Buck, 41 Barb. 417.

⁵ Frost v. Shaw, 3 Ohio, N. S. 270. See Nash v. Farrington, 4 Allen, 157; Eager v. Taylor, 9 Allen, 156; Carruth v. Grassie, 11 Gray, 211; Kyle, &c. 45 Penn. 353;

Pittman's, &c. 48 Penn. 315; Strouse v. Becker, 44 Penn. 206; Lancks's &c. 44 Penn. 395; Wilcox v. Hawley, 31 N. Y. (4 Tiff.), 648; Smith v. Emerson, 43 Penn. 456.

⁶ Browning v. Skillman, 4 Zab. 351.

⁷ Smyth v. Tankersley, 20 Ala. 212.

⁸ Wilson v. Ellis, 28 Penn. 238; Freeman v. Smith, 30 Ib. 264.

(a) In an action of trespass, for entering the plaintiffs' store and carrying away their goods, the defendant pleaded, that the goods were the property of others, against whom he as sheriff had executions, which he levied on those goods, and under which he sold them. The plaintiffs took issue on the plea, and the plea was sustained by proof, except as to some articles specified among others in the declaration, and as to which there was no proof of the value, ownership, or taking. Held, that the defendant was entitled to a general verdict. Emanuel v.

Cocke, 6 Dana, 212. See Lovier v. Gilpin, 1b. 321.

(b) An entry, by a creditor of A, upon land devised to A in fee, but subject to a trust for the benefit of B during the life of A, which entry is made to effect a levy of an execution against A, but without retaining or otherwise interfering with the possession; is not a trespass against A. Butterfield v. Haskins, 33 Maine, 392.

(c) And, if he has sold the property and received the money, the owner may waive the tort, and bring assumpsit for the money. 20 Ala. 212.

trespasser, by going behind the judgment on which the execution is founded, although in part illegal. Thus, where the judgment was for the price of goods, part of which had been illegally sold, trespass will not lie against an officer, for applying the proceeds of sales of goods attached on such execution, to a greater amount than was due for the goods legally sold and the costs of the suit; neither is the officer a trespasser *ab initio*.¹ Nor will an action lie for a trespass consented to by the debtor, though the proceedings were irregular.²

§ 34. In general, the officer may lawfully take property, in possession of the debtor or his agent.³ So one who suffers his goods to be so mingled with those of another, that the sheriff cannot distinguish them, can maintain no action until after a proper demand and refusal.⁴ But, on the other hand, an execution only justifies the sheriff in taking the property of the defendant named therein, which is liable to be levied on and sold as his property.⁵ An officer is not authorized, by a precept against one person, to take and sell the property of another, unless he has so conducted himself as to forfeit his legal rights; but he must ascertain at his own risk (being entitled to require indemnity in doubtful cases), that the property to be taken and sold is the property of the person against whom he has a precept.⁶ Thus the levy of an execution against A, upon land in the possession of B, is a trespass, for which the plaintiff in the execution, his attorney, who orders the levy, and the officer making it, are liable, unless they show that the land belonged to the defendant in the execution, and was subject to levy.⁷ And trespass will lie against the sheriff, if his officer take the goods of A on a *fi. fa.* against B.⁸ And a person whose property is seized, in the hands of another, is not bound to come forward and claim the property and try the right, but may waive that remedy, and sue the officer and the plaintiff in a separate action.⁹ So an entry upon the land of a stranger to the process, under a writ of possession, will not oust him of his possession or right of possession, but the entry and every subsequent act done under it will be a trespass.¹⁰ And a party does not lose his claim for wrongful levy of an execution, by failing to proceed against

¹ Walker v. Lovell, 8 Fost. 138.

² Barnes v. Rogers, 23 Ill. 350.

³ Bickerstaff v. Doub, 19 Cal. 109.

⁴ Smith v. Welch, 10 Wis. 91.

⁵ Hoyt v. Van Alstyne, 15 Barb. 568.

⁶ Lothrop v. Arnold, 25 Maine, 136.

⁷ McDougald v. Dougherty, 12 Geo. 613.

⁸ Ackworth v. Kempe, 1 Doug. 40.

⁹ McKay v. Treadwell, 8 Tex. 176.

¹⁰ Warren v. Cochran, 10 Fost. 379.

the officer for a previous attachment of the same property. Thus, where the plaintiff suffered a pair of oxen belonging to him to be attached, with cattle of a stranger, on a writ against the stranger, without giving the officer notice of his title; and, after the lien by attachment had terminated, and the oxen were separated from the other cattle, the officer seized them on an execution against the stranger: held, the plaintiff might maintain trespass against the officer for such seizure, and this without any special notice that the oxen were his property, and without a previous demand.¹

§ 35. In answer to an action for taking the apparent property of one not a party to the execution, the officer must prove the judgment.² So in an action of trespass against a sheriff for levying upon property, claimed by a person not the execution debtor, if the sheriff relies in defence upon a fraudulent sale to the plaintiff in the action of trespass, he must show that the plaintiffs named in the execution were creditors of the execution debtor, and that the present plaintiff was a fraudulent purchaser.³ Thus, in an action by an assignee of property, assigned for benefit of creditors, against a sheriff, for an alleged conversion, evidence of fraud in the assignment, and of the attachment, judgment, and execution, under which the defendant justified, is competent evidence in defence.⁴ And although, in a special plea of justification, the officer need not plead the judgment; yet he ought to describe the execution with sufficient certainty, stating out of what court or by what authority it issued, and giving such information in the defence, as may show the plaintiff what is relied on.⁵ (a)

¹ 16 Pick. 19.

² *Bickerstaff v. Doub*, 19 Cal. 109; *Knox v. Marshall*, Ib. 617.

³ 11 Ill. 610.

⁴ *Jacobs v. Remsen*, 35 Barb. 384.

⁵ *Cook v. Miller*, 11 Ill. 610. See *Walker v. Woods*, 15 Cal. 66.

(a) In an action against a constable, for taking the property of the plaintiff upon three executions against a third person, the constable filed a special plea, in which he set up an indemnifying bond, executed by the plaintiffs in the executions. Held, the plea need not set out the judgments on which the executions issued. *Davis v. Davis*, 2 Gratt. 363.

Where an execution issues against A, and is levied *bonâ fide* on property in the possession of B, on the allegation that the property is really in A, the action of replevin will not lie against the sheriff. *Carroll v. Hussey*, 9 Ired. 89.

In an action for the recovery of specific personal property and damages for its de-

tention, the defendant answered, that the property was seized by him, as sheriff, on an execution against one J. R.; that a trial of the right of property of J. H. R. thereto was had under the statute, before the justice and jury, which resulted in a verdict and judgment in favor of the claimant, J. H. R.; that, within three days after said trial, the plaintiff in execution executed an undertaking to the said J. H. R., in strict compliance with § 428 of the Code, and delivered the same to the defendant, as sheriff, and it was by him tendered to the claimant, who declined to receive it, and thereupon brought the present suit, said property being still in the possession of the defendant as such sheriff. On demurrer,

§ 36. It is the duty of a sheriff, in good faith, to levy on so much of the property of the defendant, if to be had, as will in all reasonable probability yield, at a public sale, the necessary amount of money. (a) The mere insolvency of a party is not a sufficient defence.² And the return must show want of property in *all* the defendants.³ But the officer is not liable, unless he knew of property or facts which required a search.⁴ In regard to the amount taken, the test to be applied in scanning the conduct of the sheriff, when he has made an insufficient levy on land, is not the opinion of witnesses, or the estimated cash value of such lands in the neighborhood, but the price at which such lands usually sold at a sheriff's sale, or were actually sold on the execution in question. And in an action for failing to levy upon a sufficiency of property to satisfy the judgment, the measure of damage is the injury sustained. The value of the property levied on should be equal to the debt, making a proper allowance for depreciation in price, the effect of a forced sale, as also costs and other incidental charges.⁵ The officer, in respect to the amount, must exercise a sound discretion; and, it seems, if the quantity seized will, in all reasonable probability, be sufficient, he will not be liable, although it prove insufficient. So, if it far exceeds a sufficient amount, he will not be

¹ French v. Snyder, 30 Ill. 339; Governor v. Powell, 9 Ala. 83; 8 Ib. 625.

² Griswold v. Chandler, 22 Tex. 637.

³ Hassell v. Southern, &c. 2 Head, 381.

⁴ Taylor v. Wimer, 30 Mis. 126.

⁵ Griffin v. Ganaway, 8 Ala. 625.

the answer was held a bar. Ralston v. Oursler, 12 Ohio (N. S.) 105.

In trespass, for breaking and entering the plaintiff's close and stable, and taking away two horses, the plea was, that an execution against a third person was delivered to the sheriff, &c.; that the horses belonged to the execution debtor and were subject to the execution; that the sheriff by virtue of the execution, and the defendants by his command, broke and entered into the close and stable, and took the horses, &c. Replication, that the horses did not belong to the execution debtor, but to the plaintiff. Held, on general demurrer, that the replication was sufficient. *M'Gee v. Givan*, 4 Blackf. 16.

(a) In reference to the *time* of levy; a sheriff, directed by a writ to put the plaintiff forthwith in possession of certain property, at first, though present on the premises, and requested so to do by the plaintiff, refused, but at a subsequent day delivered the possession as required. Meanwhile, the tenants had done divers injuries to the

premises. Held, the misconduct of the sheriff must be presumed wilful, and he must respond for these injuries in damages, however remote. *Chapman v. Thornburgh*, 17 Cal. 87.

In an action against a sheriff, for neglecting to levy on real estate, and to return the execution in proper time; where he was not requested by the creditor to levy on real, and had levied on personal estate, and, before the levy was completed, the real estate had been attached by another creditor, and there was no other attachable property; it was held that the officer was not bound to levy the execution upon the real estate, until a sufficient time had elapsed to sell the personal property; and also that the defendant was liable only in nominal damages, for the neglect of the deputy to return the execution within its life. *Bank, &c. v. Baldwin*, 31 Verm. 311. See *Dayton v. Lynes*, 31 Conn. 578; *Davidson v. Waldron*, 31 Ill. 120. As to the *place* of sale, see *Sheppard v. Shelton*, 34 Ala. 652.

liable for an excessive levy.¹ If he levies on lands which ought, in the estimation of prudent individuals, to produce sufficient, but do not, this furnishes no reason to charge the sheriff, unless actual injury has resulted to other parties from his mistake. And the sheriff exercises all the diligence required by law of him, when, after an unproductive sale of land so levied on, he makes an immediate levy on other property of value sufficient to satisfy the execution, although that cannot be sold until after the return-day, and is in fact replevied.² But when a sheriff justifies his refusal to make a levy, or his restoration of the property after a levy has been made, upon the ground that the defendant had *transferred* the property; he assumes the burden of proving that the transfer was *bond fide* and effectual in law for the purpose for which it was made.³ And an officer is liable to the execution creditor for not levying in the precise manner which he prescribes. Thus the plaintiff, having two executions against the same defendant, one of which was secured by an attachment and the other not, delivered them at the same time to an officer, with directions that, in case the defendant should offer by way of set-off an execution sued out by him against the plaintiff, the officer should set it off against the plaintiff's execution, which was not secured; but the officer set it off against the other. Held, the officer was liable to the plaintiff for thus defeating his attachment.⁴ So where there are joint parties, the officer must obey his instructions as to which of them shall be called upon.⁵ So also with regard to the selection of property.⁶ So, where the plaintiff and his attorney are present on the day of sale, and direct the officer to sell the property according to the statute, and for cash; the officer is bound to follow these instructions, and has nothing to do with former conversations or arrangements between the parties.⁷ (a) But, in

¹ Commonwealth v. Lightfoot, 7 B. Mon. 298; 30 Ill. 339.

² Powell v. Governor, 9 Ala. 36.

³ Smith v. Leavitts, 10 Ala. 92.

⁴ Coggeshall v. Varnum, 19 Pick. 422.

See Lashley v. Cassell, 23 Ind. 600; Catlett v. Gilbert, Ib. 614; Stockwell v.

Byrne, 22 Ib. 6. As to a division of the property, West v. Cooper, 18 Ind. 1; Benton v. Wood, 17 Ind. 260.

⁵ Root v. Wagner, 30 N. Y. (3 Tiff.) 9.

⁶ Childs v. Dilworth, 44 Penn. 123.

⁷ Walworth v. Readsboro, 24 Verm. 252.

(a) If a writ, issued from a court of competent authority, has been superseded, after it has come into the hands of the proper officer, it is the duty of the party against whom it issued, to have the officer notified of the *supersedeas*, in such manner that he will be protected in refusing to execute the

writ. And an officer, having a valid execution in his hands, must be served with a written order from competent authority, requiring him to suspend all action upon it, before he can be held liable for obeying its mandate. Payne v. The Governor, 18 Ala. 320.

the absence of express instructions, the officer is not bound to adopt the most beneficial mode of levying an execution. Thus a creditor attached the interest of his debtor in real estate, consisting of a homestead and of a wood-lot mortgaged to different persons. The debtor subsequently mortgaged the homestead to W, and another creditor then attached the interest of the debtor in the real estate; and the executions of both creditors were delivered to the officer at the same time. The officer levied the first creditor's execution on the equity of redemption in the wood-lot, and in consequence the second creditor's execution remained unsatisfied. Held, the officer was not liable to an action for so doing.¹ And a direction to attach real estate upon the writ does not constitute a request to levy the execution upon the debtor's real estate, if one should be issued.² (a)

§ 37. We have already (chap. 29) considered the duty of an officer as to the *return* of process served by him. With regard to the return of *executions* it is held, that, when a sheriff neglects to return an execution, the plaintiff has a *prima facie* right to recover the amount thereof, in an action against the sheriff; but the sheriff may show, in mitigation, that the defendant had no property subject to levy, though not that he now has sufficient to pay it.³ So, although the creditor may have sustained no damage in consequence of the neglect, he is entitled to nominal damages; for, where there is a neglect of duty, the law presumes that damages have been sustained.⁴ (b) And, in an action against a sheriff for a false return on an execution, where there is property enough to levy it on, the damage to be recovered is the amount of the execution. He will not be permitted to prove that a less sum was due on the judgment.⁵ So, in a proceeding against an officer for failure to return an execution, a tender by him of the amount

¹ Laffin v. Willard, 16 Pick. 64.

² 31 Verm. 311.

³ Ledyard v. Jones, 13 Seld. 550.

⁴ Laffin v. Willard, 16 Pick. 64.

⁵ Bacon v. Cropsey, 3 Seld. 195.

(a) The sheriff has no right to allow the plaintiff's attorney to take complete control of the proceeds of an execution sale.

If he do this, he will be held to a rigid accountability.

If the lands decreed to be sold in a partition suit are sold, and the whole transaction connected with the sale carried on by the plaintiff's attorney with the assent of the sheriff, he will be deemed the sheriff's agent, and the sheriff will be held account-

able for all moneys received by the attorney in the transactions. *Van Tassel v. Van Tassel*, 31 Barb. 439.

In case of alleged *waiver* and *ratification* by the creditor, by receipt of the proceeds; the question is for the jury. *Brainerd v. Dunning*, 30 N. Y. (3 Tiff.) 211.

(b) A sheriff is not liable to be *amerced* for not returning an execution according to law. *Bitter v. Merseles*, 4 Zab. 627.

thereof, after notice and before judgment, is no ground of defence against the motion. The failure to return the execution according to law fixes the liability of the officer, which cannot be discharged by a tender.¹ So, where the return-day of an execution levied on land falls within the time allowed by law for recording the execution in the registry of deeds, if the officer does not either cause it to be duly recorded, or return it into the clerk's office on or before the return-day, or deliver it to the creditor in season to be put upon record; he will be liable to the creditor for the value of the land lost by his neglect.² But the law does not require the sheriff of another county, to whom an execution is issued, to return it either in person or by deputy. If he deposits it in the post-office, properly directed, in time to reach the clerk of the court from which it issued by the return-day, it is sufficient.³

§ 38. If a sheriff sell goods upon an execution without legally advertising the sale, and return that he advertised and sold them according to law, he will be liable to an action on the case for a false return, but the judgment debtor cannot maintain trover for the goods.⁴

§ 39. A sheriff is only required to use ordinary diligence in the execution of process. Hence, if a debtor has property, and the sheriff, exercising ordinary diligence, which is a question of fact for the jury, has no notice of it; he is not liable on a return of *nulla bona*.⁵

§ 40. The liability of an officer, in reference to *the payment of money* received by him from a sale on execution, has often come in question. The subject, however, is usually regulated by statutes; which enforce this important duty by a rigid forfeiture for its violation.⁶

§ 41. It is held, that a sheriff is not bound to collect an execution, and pay the amount to the plaintiff, before the return-day of the writ.⁷ (a) So in Massachusetts it is held, that a sheriff is

¹ Chaffin v. Crutcher, 2 Sneed, 360.

² M'Gregor v. Brown, 5 Pick. 170.

³ Underwood v. Russell, 4 Tex. 175.

⁴ Livermore v. Bagley, 3 Mass. 487.

⁵ Barnes v. Thompson, 2 Swan, 313.

⁶ See Cockerham v. Baker, 7 Jones, 288; Alleghany, &c. 48 Penn. 328; Morse v. Knowlton, 5 Allen, 41.

⁷ State v. Mann, 13 Ired. 444.

(a) In general, the sheriff is bound to pay over money at the return-day, though not demanded; and before, if demanded.

Dale v. Birch, 3 Camp. 347; Rogers v. Sumner, 16 Pick. 387.

If a deputy receive the debt and cost, and stay service, the sheriff is immediately

not obliged to bring money into court which he has received on execution, but may retain it till demanded. (a) But, after demand and refusal, whether before or after the return-day of the execution, he is liable to the creditor's action for the money, and interest at the rate of 30 per cent.¹ And an action lies, though there are conflicting claims to the money, and the creditor refuses to give the officer a bond of indemnity. But not, in such case, in the absence of any sinister motive on the part of the officer, for the statutory penalty of five times the lawful interest, imposed for *unreasonably* neglecting or refusing to pay over money.² So the (California) statute (April 29, 1851), does not extend to the case of a well-founded doubt on the part of the sheriff, whether the party demanding money raised on an execution is lawfully entitled to it, but only to cases of wilful delinquency. He is not compelled to decide, at the risk of being ruled against, whether a party claiming under an assignment from the plaintiff has really a valid assignment.³ So, where a sheriff has collected money on execution, and is notified not to pay it over to the plaintiff, and a motion for that purpose is made in court; he is not liable to the plaintiff for the penalty of 5 per cent. per month, for not paying him the money, until the decision of such motion.⁴ But if he refused to pay over the money, because, by direction of the debtor, he has attached it, on a writ in favor of the debtor against the creditor, he is subject to the statute penalty.⁵ The very strict rule

¹ Wakefield v. Lithgow, 3 Mass. 249; Rogers v. Sumner, 16 Pick. 387. See Church v. Clark, 1 Root, 303; Nelms v. Williams, 18 Ala. 650.

² Rogers v. Sumner, 16 Pick. 387.

³ Wilson v. Broder, 10 Cal. 486.

⁴ Conway v. Campbell, 11 Mis. 71.

⁵ Thompson v. Brown, 17 Pick. 462.

liable for the amount, without demand. Green v. Lowell, 3 Greenl. 373.

If a sheriff pays money raised under a *fi. fa.* to the plaintiff in the execution before the return-day, or permits him to purchase the goods, and the writ is set aside by the Court; he is liable to subsequent execution creditors; and a decree of the Court, sanctioning the payment, will not protect him, where the money has not been paid into court. Williams's Appeal, 9 Barr, 267.

(a) In this State, special provision is made for the application of surplus moneys arising from an execution sale to other executions placed in the hands of the officer for that purpose. In an action against a sheriff, for not paying over money collected on an execution in favor of the

plaintiffs, the declaration alleged, that the execution was delivered to the defendant; that he ought to have satisfied it out of moneys of the debtor, arising from the sale of his property, made by the defendant, which property was attached by the defendant on the writ; and that the moneys were more than sufficient to satisfy the execution, after paying off all previous attachments. Held, that, in order to bring the case within the Stat. 1804, c. 83, § 6, it should have been averred, that the sale was made by the defendant *virtute officii*, and that the plaintiff's execution was delivered to the defendant, before he had paid over the surplus money to the debtor. Wheeler v. Willard, 14 Pick. 486. See Buckmaster v. Drake, 5 Gilm. 321

has also been applied, that where an officer, who had collected money upon execution, paid it to the creditor's attorney of record in the action, but whose power had been revoked by the creditor before the execution was delivered to the officer; this was no legal discharge of the officer.¹

§ 42. It has been held that a sheriff, who receives money on an execution *after the return-day*, and fails to pay it over, is not liable for the failure in his official capacity; but he is liable to the plaintiff in an action for money had and received.² But a sheriff, by whom an execution has been levied on personal property whilst the execution is in force, may sell after the return-day of the writ, and, having the power to sell, he may receive the money in satisfaction of the execution, without a sale, and, by such receipt, and failure to pay it over to the plaintiff, subject his securities to liability therefor.³

§ 43. If money is collected on execution, and held by a deputy-sheriff, who has since ceased to hold the office and has left the Commonwealth; a demand upon the sheriff, under oral authority from the plaintiff, is sufficient to render him liable for the money.⁴ So in an action against the sheriff for money collected, the return on the execution of the amount collected, made by his deputy, is held conclusive in favor of the plaintiff.⁵ So in an action against a sheriff, for the default of his deputy in not paying money made by him on an execution, which he returned satisfied, and on which he sold chattels alleged by him in his return to have been the property of the execution debtor; the sheriff cannot defend, by showing that the chattels were the property of a third person, who forbade the sale, and directed a suit to be brought against the deputy for a trespass, without evidence that such suit was commenced, and a judgment recovered against the deputy. And it is doubted whether proof of such judgment would constitute a defence.⁶ But, on the other hand, it is held, that, in a suit for not paying money, the sheriff may show, even in contradiction of his return, that the goods belonged to a third person, to whom he is liable; or that the judgment debtor has become bankrupt, and the money belongs to his assignees.⁷ And where a sheriff sells prop-

¹ *Parker v. Downing*, 13 Mass. 465.

² *Hamilton v. Ward*, 4 Tex. 356. But see *James v. Yates*, 3 Met. (Ky.) 343.

³ *Evans v. Governor*, 18 Ala. 659.

⁴ *King v. Rice*, 12 Cush. 161.

⁵ *Sheldon v. Payne*, 3 Seld. 453.

⁶ *Weston v. Ames*, 10 Met. 244.

⁷ *Brydges v. Walford*, 6 M. & S. 42; 2 Greenl. Ev. § 583, n.

erty under a junior execution, having an elder one in his hands at the time, he is bound to apply the proceeds to the satisfaction of the senior *fi. fa.*, though between the times, when they were respectively received by him, the debtor sold property, which the senior creditor declined to allow the sheriff to levy upon.¹ (a)

§ 44. Money in the hands of a sheriff, collected under execution, when not more than sufficient to satisfy the debt and costs, is the money of the plaintiff in execution; and the extent of the sheriff's lien upon the fund, in case of a controversy, must be settled between him and the plaintiff. And when the money collected is not enough to satisfy the debt and lawful costs, and the sheriff retains more than his lawful fees; the defendant in execution cannot, after paying to the plaintiff the balance of his debt, allowing the sum appropriated by the sheriff, recover from the sheriff the amount unlawfully retained by him.²

§ 45. Though a sheriff goes out of office before completion of the execution of process, he is still liable to pay over the money collected on execution, and the interest provided in such case by statute, on motion.³ And where a sheriff, after his term of office had expired, appointed an agent to attend to all the business relating to the office, with full authority to pay out, or to refuse to pay; it was held, that a demand from such agent, of money collected, was a sufficient demand to charge the sheriff.⁴

§ 45 a. An officer who sells an equity of redemption upon execution, and holds the surplus, after satisfaction thereof, upon a second attachment, which has since failed, is not liable to the *judgment debtor* for such surplus until he has received notice of the dissolution of the second attachment; and therefore the statute of limitation does not begin to run until that time.⁵ (b)

¹ *Furman v. Christie*, 3 Rich. 1.

² *Chenault v. Walker*, 22 Ala. 275.

³ *Buckmaster v. Drake*, 5 Gilm. 321.

⁴ *Alexander v. Hancock*, 2 Rich. 100.

⁵ *King v. Rice*, 2 Cush. 161.

(a) A sheriff, having two executions, sold personal property for a sum that was insufficient to satisfy the first, and made a levy on real estate for the balance; and subsequently the defendant gave to the sheriff a sum of money, with directions to pay it to the creditor in the junior execution. Held, the sheriff could not levy on the money under the first execution; and was justified in returning that it was made on the second, and paying it to the plaintiffs therein. *Rudy v. Commonwealth*, 35 Penn. 166.

(b) The sheriff levied a *fi. fa.* in time to

raise the money before the return day, and turned over the execution to his successor in office, in whose hands the sale was arrested by an affidavit of illegality. Held, the first sheriff had done right, and should not be ruled against for the money. *Lauham v. Vaughan*, 26 Geo. 358. See *Alleghany, &c.* 48 Penn. 328; *M'Kay v. Thorington*, 15 Iowa, 25.

It is the duty of a *deputy* to pay over to the principal sheriff all the moneys collected by him as such, within a reasonable time, and, if he fail to do so, an action may

§ 46. An officer, having personal property in his possession, by virtue of an execution against the owner, may maintain trespass, trover, or replevin against any one who takes it out of his possession; although the execution has not been returned, if the return-day has not arrived.¹ And the officer has been held to have this

¹ Sewell v. Harrington, 11 Verm. 141; Davidson v. Waldron, 31 Ill. 120; Dun-kin v. M'Kee, 23 Ind. 447.

be maintained against him without a previous demand. Nelms v. Williams, 18 Ala. 650.

And the rule applicable to common-law actions against the sheriff, for failing to pay over money collected by virtue of his office, applies, where the deputy is sued by the principal sheriff for a similar default. Ibid.

Where a judgment has been recovered against a sheriff, for the default of his deputy in failing to pay over money received on an execution, the sheriff may, though he has discharged the judgment, maintain a motion against the deputy and his sureties, for the amount of the judgment recovered against him. Weaver v. Skinker, 4 Gratt. 160.

But where a sheriff has satisfied a judgment, recovered against himself for the default of his deputy, in failing to pay over money received on an execution; he can, upon a motion against the deputy and his sureties, recover only the amount of such judgment, and not the aggregate amount of debt, interest, and costs, with interest thereon. Ibid.

And a statute which provides that, where a sheriff has paid or is liable to pay money for the default or misconduct of his deputy, he may, by motion, recover judgment against the deputy and his sureties, upon satisfactory proof, &c., does not change the common-law principles applicable to such cases; and therefore, if the insufficient return is in the handwriting of the sheriff, though signed by his deputy, there is no "default or misconduct" on the part of the deputy. Cate v. Howard, 1 Swan, 15.

The fact, that an execution issued for a less sum than the amount of the judgment, constitutes no defence for a sheriff who has collected it, either by himself or his deputy, in an action for not paying it to the creditor. So, although the action was not commenced for the default, until after both the sheriff and deputy had gone out of office. Coburn v. Chamberlin, 31 Verm. 326.

In Georgia, when a sheriff neglects to levy a *fi. fa.* until too late to make the money for the next term, and an injunction is granted, which has no merit in it, and so does not, in fact, prevent the collec-

tion of the *fi. fa.*; he may be ruled for the money. Caruthers v. Sprayberry, 26 Geo 437.

In Kentucky, ten per cent. given against a sheriff who fails to pay a debt to a county creditor, when he should have done so, is not an annual rate of interest, but is given out by way of damages. Terrill v. Cecil, 3 Met. 347.

Upon motion to hold a sheriff liable for a county debt which he should have paid to the county creditor, and has not, judgment may be rendered by default, but it is incumbent upon the plaintiff in such case to introduce proof of the fact which he relies upon. Ibid.

Where the statute makes the sheriff liable for failing to pay such county creditors as have their names upon a certain list furnished to him, if demand be made upon him, a motion to fix such liability is defective, if it fails to allege that the plaintiff's name was upon such list and that the demand was made. Ibid.

A sheriff, who fails to pay into the treasury the public moneys in his hands by the 15th of December, is liable for interest on the same from the first day of June preceding. He is also liable for twenty per cent. damages, to be estimated upon the amount due on the first-named day, instead of the balance due when the motion against him and his sureties is made. Mershon v. Commonwealth, 2 Met. 371.

Though § 22 of the New York statute of limitations, respecting the commencement of action against sheriffs, does not apply to proceedings as for contempt to enforce civil remedies; yet in its spirit it is applicable, and the court will therefore follow it, in the exercise of its discretion. Van Tassel v. Van Tassel, 31 Barb. 439.

For the omission of a sheriff to pay over to the county treasurer the proceeds of a sale of lands in a partition suit, the period of limitation begins to run from the time of the omission, not from the time the party in interest is apprised of it. Ibid.

In Texas, motion for a rule to compel a sheriff to pay over money collected by him on execution (Art. 1333, Hart. Dig.) does not lie in favor of an assignee of the party entitled to the money, to whom he has

right of action without actual possession. Thus, where a constable levies on personal property, and leaves it in the possession of the defendant, he only loses his lien thereon, when the property is levied on under other executions, and may maintain trover against one who removes it without such execution.¹ So where a constable levied an execution on the defendant's horse, and it was agreed that the defendant should ride the horse home, and that the constable should wait for his money; it was held that the agreement was merely voluntary, and that the constable might re-seize the horse, and, if it was taken from him by force, might bring trover to recover it.² (a) The property must be in the power or the view of the sheriff.³ Though he need not have manual possession.⁴ His possession must be such as would be a tres-

¹ *Mangum v. Hamlet*, 8 Ired. 44.

² *Douglass v. Mitchell*, 2 Murph. 237.

³ *Linton v. Com.* 46 Penn. 294.

⁴ *Bond v. Willett*, 31 N. Y. (4 Tiff.) 102. See *Minor v. Smith*, 13 Ohio, St. 79.

given an order for it on the sheriff. *Beaver v. Batte*, 19 Tex. 111.

A sheriff has no authority to receive anything but money on an execution, and therefore a return, declaring the execution satisfied by a note, is certainly not conclusive, and, unless it also shows a special authority to take a note, probably not even *prima facie*, evidence of payment. *Mitchell v. Hackett*, 14 Cal. 661; *Dibble v. Briggs*, 28 Ill. 48.

If both plaintiff and defendant consent that the sheriff shall sell on credit, they cannot complain that he does not pay the proceeds immediately upon the sale. *Langdon v. Summers*, 10 Ohio (N. S.), 77.

Where a sheriff, under proceedings in partition, sold land for a sum in hand, taking judgment-notes for the balance of the purchase-money in his own name, which were afterwards lost, and suit brought against him therefor on his official recognition, by the parties interested; held, it should have been left to the jury, whether the money was lost by the negligence of the sheriff; and it was error to charge the jury, that the plaintiff was entitled to a verdict. *Snively v. Commonwealth*, 40 Penn. 75.

The sheriff's return made him liable to pay the hand-money into court, or to the several parties interested, so soon as their shares were ascertained, or to a call to bring the judgment-notes into court, that the parties might have them properly disposed of. *Ib.*

If an officer takes anything but money, or bank-notes circulating as such, in the

absence of instructions, in satisfaction of a judgment, this will not bind the plaintiff, who may proceed on the judgment as before, and oblige the defendant to pay it again. But an officer would be estopped to set up this rule to defeat a proceeding against himself. So if it was the act of his deputy. But the sureties are not so estopped. *Draper v. State*, 1 Head, 262.

If a sheriff collects money on a *fi. fa.* and deposits it in a bank which fails, he is liable to the plaintiff. *Phillips v. Lamar*, 27 Geo. 228.

(a) A constable levied an execution on a mare, which was claimed by a third person, and on a trial of the right of property the claimant succeeded. Pending the trial, the constable delivered the mare to A and B, one of whom was the execution plaintiff, they agreeing in writing to return the mare to the constable, or pay him \$35.50 should the claimant succeed. After the trial, A and B tendered to the constable \$35.50, which he refused, but they would not return the mare. Held, that the constable could not maintain trover against A and B for the mare. *Grady v. Newby*, 6 Blackf. 442.

A deputy sheriff may insure property levied upon. *White v. Madison*, 26 N. Y. (12 Smith) 117.

But a sheriff has no right to the use of property levied on. Thus a levy on manuscripts gives him no right, before the sale, to make and sell copies thereof. And he is liable for the damages occasioned by such wrongful act. *Banker v. Caldwell*, 3 Min. 94.

pass, but for his official authority.¹ But, to maintain trover for goods taken in execution, the officer must have made an actual and effectual levy.²

§ 47. The right of the officer, to maintain an action on account of property levied upon, has been held to exclude any such right on the part of the judgment creditor. Thus where a levy has been made on goods, which are afterwards distrained by the landlord for rent in arrear, no action can be maintained against the landlord by the execution creditor, but only by the officer.³

§ 48. With regard to *the measure of damages* against an officer, for his default in relation to an execution, it will be, in general, the injury actually sustained by the plaintiff therefrom. It has been held, that, in an action against a sheriff, for failing, through mere negligence, to make the money on an execution, and to return it according to its mandate, the amount of the execution is the measure of damages, notwithstanding the defendant may have continued entirely solvent; and that the mere failure of the plaintiff to enforce satisfaction of his execution from the defendant, when he could have done so, does not impair his remedy against the sheriff.⁴ But the prevailing rule is, that the measure of damages is the amount of injury actually sustained. (See chap. 29.) Thus the plaintiff, being grantee of an equity of redemption, for the purpose of strengthening his title, caused it to be sold on an execution which he held against his grantor, bid it off himself for the amount of the execution, and took a deed of it from the officer, but paid the officer no money except his fees and expenses. In consequence of a neglect on the part of the officer, the sale proved ineffectual, but the plaintiff's title was valid independently of the sale. Held, the plaintiff might maintain an action against the officer for his default, but the measure of damages was not the sum bid by the plaintiff at the sale, but the amount of the fees and expenses actually paid by him, with interest from the time of payment.⁵

¹ *Havely v. Lowry*, 30 Ill. 446; *Roth v. Wells*, 29 N. Y. (2 Tiff.) 471.

² *Brian v. Strait*, Dudley, S. C. 19.

³ *Taylor v. Manderson*, 1 Ashm. 130.

⁴ *Evans v. Governor*, 18 Ala. 659.

⁵ *Sexton v. Nevers*, 20 Pick. 451.

CHAPTER XXXI.

ARREST, BAIL, ESCAPE.

1. Arrest.
2. Bail.

3. Escape.

§ 1. *Arrest of the body*, as well as seizure of property, being a mode provided by law for the service of civil process; the rights and liabilities of an officer are also to be considered in the former as well as the latter point of view. (a)

(a) See chap. 6; *Hooper v. Lane*, 8 Ell. & B. 1095.

In an action for failing to serve a *capias*, the sheriff cannot show that he and his deputies had always found difficulty in arresting the party. *Spence v. Tuggle*, 10 Ala. 538.

If a judgment creditor directs an officer to arrest the debtor on execution, but not to commit him until further orders, the officer is justified in not arresting him. *New Hampshire, &c. v. Varnum*, 1 Met. 34.

In an action against a sheriff for arresting a stockholder on an execution against a manufacturing corporation, the defendant may give in evidence his instructions from the judgment creditor. *Richmond v. Willis*, 13 Gray, 182.

In relation to arrest, see, further, *Niver v. Niver*, 43 Barb. 411; *Honey v. Starr*, 42 Barb. 435; *Smith v. Knapp*, 30 N. Y. (3 Tiff.) 581; *Houghton v. Wilson*, 10 Gray, 365; *Gunn v. Davis*, 26 Geo. 169; *Hooper v. Lane*, 8 Ell. & B. 1095; *Jones v. Seward*, 41 Barb. 269.

We have already (p. 2, n.) briefly referred to the right of arrest upon civil process, as somewhat depending upon the nature of the cause of action—upon the consideration, whether it is simply an express or implied contract, or whether it also involves a wrong or fraud, in which latter case alone, by the prevailing statutory law, imprisonment is now authorized. A few somewhat miscellaneous cases, upon this and other topics relating to the general

subject of arrest, may here properly be added.

A statute authorizing arrest on certain conditions is to be construed strictly. The required affidavit must state the facts upon which a belief of fraud is predicated. Otherwise the order of the court or magistrate is void, and the arrest illegal. But a statement of facts, which have a legal tendency to induce such belief, though the facts be slight and inconclusive, will sustain the order till reversed or set aside. The issuing of it is only an error in judgment. *Spice v. Steinruck*, 14 Ohio St. 213.

Where a statute provides for an arrest, upon affidavit that the defendant is *likely* to remove beyond the jurisdiction; an affidavit that he "*intends* to leave the State" is insufficient. *Wood v. Melius*, 8 Allen, 434.

The writ required by (New Hampshire) Rev. Sts. c. 185, § 8, to be indorsed with the affidavit of the creditor, or some person in his behalf, to justify an arrest of a debtor on mesne process or execution, is the writ by virtue of which such arrest is made; and an affidavit upon a writ of mesne process is not sufficient to authorize an arrest on the execution issued in the action. *Kidder v. Farrar*, 20 N. H. 320.

In New York, one authorized to sell, and keep all he can get beyond a fixed price, though he is not to pay over the identical money received, but may pay by his own check, is an *agent*, and liable to be arrested for not paying over the proceeds. *Barret v. Gracie*, 34 Barb. 20.

§ 2. The rights and duties of officers in reference to *bail* are often brought in question.¹

¹ *Townsend v. Stoddard*, 26 Geo. 430; *Bartlett*, 10 Gray, 490; *Metcalf v. Stryker*, *Outlaw v. Gilmer*, 27 Geo. 365; *Mass. v.* 31 Barb. 62.

So a person receiving money for the purchase of goods, and under a distinct understanding that it is not to be used in any other way, is a *factor acting in a fiduciary capacity* within the meaning of § 179 of the code, and may be held to bail for a misappropriation of the money. *Noble v. Prescott*, 4 E. D. Smith, 139.

In New Jersey, the defendant acted as the plaintiff's agent, was by him intrusted with goods to be used in his business, and converted those goods to his own use. He was, as agent, intrusted with blank acceptances, to be filled up, as required in the business, for the use of the principal, in divers sums to a certain aggregate amount, and he filled them to a much larger amount, and appropriated the avails of all to his own use. Held, a fraud and misdemeanor, for which he might be held to bail. *Seidel v. Peschkaw*, 3 Dutch. 427.

Where A, one of two contracting parties, placed in the hands of B, the other, certificates, by way of security, which were wrongfully converted by B, and A brought a suit for damages; held, the judgment was not for a debt arising out of a contract, and B might be arrested, under Wisconsin Rev. Sts. c. 127, § 2, and execution against his person might issue under Rev. Sts. c. 134, § 7. *Mowry*, 12 Wis. 52.

But, in New Jersey, under the statute authorizing imprisonment for debt in case of fraud, it is requisite to holding to bail, that the fraud be clearly shown, and by such testimony as would be admissible in a court of justice. *McKernan v. McDonald*, 3 Dutch. 541.

So, in New York, where an insolvent purchases goods on the strength of his own representations of solvency, he is not liable to arrest in an action for the value of the goods, unless he knew that such representations were false at the time he made them. Suspicious circumstances, attending an assignment of property by an insolvent, are not sufficient *per se* to authorize his arrest and imprisonment. *Birchell v. Strauss*, 28 Barb. 293.

In case of representations as to the pecuniary ability of a third person, whereby the plaintiff was induced to sell and deliver to the latter goods on credit, and was damaged; the defendant cannot be held to bail, unless it be shown by the affidavits that he is a non-resident, or is about to depart from the state. The liability is not a debt fraudulently contracted, nor an obligation fraud-

ulently incurred, within the meaning of sub. 4, of § 179 of the Code. *Smith v. Corbiere*, 3 Bosw. 634.

Where a debtor delivered, as security for a loan, several orders drawn by his wife for money yet to become due her, payment of which she afterwards stopped; held, not a case authorizing an order of arrest for a fraud. *Isaacs v. Gorham*, 1 Hilt. 479.

Where a cause of action authorizing an arrest is joined with one not of that class, the right of arrest is waived. *Lambert v. Snow*, 2 Hilt. 501.

So, in case of such joining, where the plaintiff recovers an entire judgment. *Hickox v. Fay*, 36 Barb. 9.

An affidavit for the arrest of "the defendant," in a writ against two defendants, without showing which is intended, is insufficient to authorize the arrest of either. *Hitchcock v. Baker*, 2 Allen, 431.

Where the sheriff (or his officer) has arrested on one valid writ, he may detain on any number which he had at the time, or afterwards. But in case of an arrest on an invalid writ, the party has been deprived of his liberty, in circumstances which make it the duty of the sheriff to discharge him. He has no right to treat him as a person deprived of his liberty, and an arrest on the valid writ is therefore necessary. But to allow the sheriff to make such an arrest, while the party is unlawfully confined by him, would be to permit him to profit by his own wrong. The sheriff cannot arrest him, because he has already been deprived of his liberty; nor detain him, because he is entitled to be discharged. The custody amounts to a false imprisonment.

The liberty of the subject requires, that a person illegally arrested should have an absolute unqualified right, against the person who has illegally arrested him, to be set at large, without reference to others.

Though for some purposes the sheriff is the *agent* of the party who puts a writ into his hands, he is not a mere agent. He is a public functionary, having duties to perform, as well towards those against whom the writs in his hands are directed, as towards those who put those writs into his hands, to both parties. *Hooper v. Lane*, 8 Ell. & B. 1095.

A creditor, by a concerted fraud, induced his debtor, who resided abroad, to come to England, and immediately had him arrested by order of a judge. Upon affidavit, the court, by rule, set aside the

§ 3. It is held in England, that, if a defendant in custody upon *mesne* process tender a bail bond, with sufficient sureties to the

whole, as an abuse of the process of the court. *Stein v. Valkenhuisen*, 1 Ell. B. & E. 65.

A militia officer cannot, when out of the State, claim exemption from civil process, upon the ground that he is on his way, under the orders of his commanding officer, to attend a company meeting, for escort duty, within the State; since, in such case, he is without the jurisdiction of his commanding officer. *Manchester v. Manchester*, 6 R. I. 127.

But suitors are exempt from arrest on civil process, whilst going to, staying at, or returning from, court, though they reside out of the State. *Hanegar v. Spangler*, 29 Geo. 217.

In England, a person who attends before justices at petty sessions, in order to obtain a summons with a view to recover a penalty, and gives evidence before them for the purpose, is not privileged from arrest, either in going there with a view to give the evidence and obtain the summons, or on his return after having done so. *Cobbett*, 7 Ellis & B. 955.

In New York, an order of court, for arrest on execution, is not necessary. *Ginochio v. Figari*, 4 E. D. Smith, 227.

The act of 1831, authorizing imprisonment for debt in certain cases, applies to debts which have been assigned. *King v. Kerby*, 28 Barb. 49.

The provisions of subdivision 2 of § 179 of the code, authorizing the arrest of a public officer, in an action for money received and property embezzled and fraudulently misapplied by him, are applicable to an English public officer, who has, in England, on a writ of extent, been found by the inquisition of a jury to have embezzled public funds. The proceedings there do not amount to an extinguishment of the original claim. *Peel v. Elliott*, 28 Barb. 200.

In an action for real property, and damages for withholding it, the defendant may be arrested and held to bail. Consequently, if the plaintiff fails in the action, and there is a judgment against him for the costs, he becomes himself the judgment debtor, and, by virtue of § 288 of the Code, is liable to arrest and imprisonment upon execution. *Merritt v. Carpenter*, 30 Barb. 61.

Where a defendant, having been arrested on an execution issued by the marine court, is discharged from arrest by that court on motion, such discharge, without the plaintiff's consent, does not deprive the plaintiff

of the right to issue a second execution. *Ginochio v. Figari*, 4 E. D. Smith, 227.

Where the right to arrest arises from the nature of the action, as where it is for a conversion by an agent, affidavits to disprove the cause of action are inadmissible. *Solomon v. Waas*, 2 Hilt. 179.

An order of arrest, upon a cause of action which would authorize an execution against the body, will not be vacated, merely because the affidavits deny the cause of action. *Bedell v. Sturta*, 1 Bosw. 634.

The facts in issue, on a motion to discharge an order of arrest, were the same as those constituting the cause of action. On the affidavits, there was a fair question for the jury, and therefore the court refused to prejudge the case, and allowed the order to stand. *Barret v. Gracie*, 34 Barb. 20.

In Massachusetts, under St. 1857, c. 141, § 17, no person can be arrested on *mesne* process, if the affidavit of the creditor, "that he believes that the defendant has property not exempt from being taken on execution," omits to add, "which he does not intend to apply to the payment of the plaintiff's claim," or to state not only that the creditor believes, but that he "has reason to believe, the defendant has property," &c. *Stone v. Carter*, 13 Gray, 575.

In Pennsylvania, the act of July 12, 1842, is a substitute for the old law of arrest and imprisonment in actions on contracts. It provides that, on application, a creditor, after suit, and after substantiating the necessary facts, may have an order of commitment. *Gosline v. Place*, 32 Penn. 520.

In California, to justify execution against the person, the issue of fraud must be made by the pleadings, passed upon by the jury, and ascertained by the judgment. *Davis v. Robinson*, 10 Cal. 411.

The arrest upon an affidavit is only upon *mesne*, not upon final process. *Ibid.*

If the circumstances authorizing arrest occur pending the suit, the party must, upon leave obtained, set them out in a complaint. *Ib.*

There must always be a special finding on the question of fraud, so as to keep it distinct from the body of the case. *Ib.*

In Louisiana, it is not necessary to state in the affidavit for a writ of arrest, where the defendant resides or has his domicile. *Hanney v. Bochner*, 14 La. An. 859.

If the case comes within the exception in favor of non-residents, the defendant may plead the exception, and, on proof of it, the proceeding in arrest will be set aside, if it

bailliff, and he refuse it, yet an action of trespass will not lie against him, but only an action on the case against the sheriff.¹ But, in

¹ *Smith v. Hall*, 2 Mod. 31.

was not alleged in the affidavit that the defendant had absconded from his residence. *Ibid.*

In Arkansas, females are privileged from arrest in civil cases. Hence a *capias* clause against a female defendant, in a writ of attachment, is illegal, and may be quashed on motion; but if the writ be in other respects good in form, the whole writ should not be quashed. *Hatheway v. Jones*, 20 Ark. 109.

In England, where a writ of summons is specially indorsed under § 25 of the common-law procedure act, 1852, and judgment is signed for default of appearance, pursuant to § 27, after payments made by the defendant on account, the plaintiff is not entitled to sign judgment for the sum indorsed upon the writ, but only for the balance remaining due after giving credit for the moneys paid. *Hodges v. Callaghan*, 2 C. B. (N. S.) 306.

By a special indorsement under the above statute, the plaintiff claimed 34*l.* 11*s.* 7*d.* The defendant, after the issuing of the writ, and before judgment, paid 25*l.* on account, and judgment was signed and execution issued for the full amount, but with a direction to the officer to take the balance only, and costs. The defendant having been arrested and detained under this writ, a judge at Chambers made an order to reduce the amount for which the judgment was signed to the proper sum, and to discharge the defendant from custody, in pursuance of the 7 and 8 Vict. c. 26, § 57, the sum recovered not exceeding 20*l.*, exclusive of costs. The court refused to rescind the order. *Ibid.*

The arrest took place on the 14th of August, and the application for the defendant's discharge was not made until the 11th of December. Held, not too late. *Ib.*

An order of the war department, relating to the arrest and detention of deserters, and specifying the persons authorized to make such arrests, should be construed strictly, and with the precise limitations which it prescribes. It does not authorize any *procuratio* or delegation. The maxim applies, "*Expressio unius est exclusio alterius.*" An order to *sheriffs* gives no authority to *deputy-sheriffs*. *Trask v. Payne*, 43 Barb. 569.

The *sergeant at arms* of the legislature of Massachusetts may lawfully detain in the county jail, with the permission of the sheriff, a prisoner committed by authority

of the House of Representatives. *Burnham v. Morrissey*, 14 Gray, 226.

The commitment of a witness, by order of the House, for a term not exceeding thirty days, for contempt in its presence, by refusing to produce books and papers which he had been lawfully required to produce, is not invalidated by containing a direction, that, upon informing the officer of his readiness to produce them, he shall be brought before the house. *Ibid.*

A committee of the house, invested with general powers to investigate the affairs of the state liquor agency, established by St. 1855, c. 215, and to send for persons and papers, reported, that they had notified the agent, and he had appeared before them, but had refused to produce certain books. Whereupon he, by order of the house, was arrested and brought before the house to answer as for a contempt, and was interrogated by the house, and asked to produce the books; and, after being heard by counsel, declined to do so, on the ground that he had no books which he had not produced before the committee, except his private books of account, which contained nothing relating to the matters inquired of. The house thereupon, without further hearing him, passed an order, reciting that he had failed satisfactorily to answer the questions put to him by the house, or to produce the books and papers required of him by a special committee of the house, and also by the house, and was therein guilty of a contempt of its authority; and therefore issued a warrant to the sergeant-at-arms, reciting that he had been brought to the bar of the house, to answer as for contempt in refusing to comply with the order of the special committee of the house to produce certain books, and had refused satisfactorily to answer the interrogatories of the house, or to produce the books required of him by the committee and by the house; and reciting the order of the house thereon; and committing him for twenty-five days, unless he should sooner signify his willingness to produce the books, and satisfactorily answer the interrogatories. Held, the commitment was legal. *Ib.*

A sheriff is not authorized to make an arrest, out of the presence of the court, by a mere order of such court, though such order may justify a detention of one already arrested. There must be a process conformable to the constitution. Nor is it the right or duty of a sheriff to make an arrest,

an action for refusing to take bail, it is sufficient to prove the arrest, the offer of sufficient bail, and the commitment. The party is not bound to tender a bond.¹

§ 3 a. The debtor by his acts may waive his claim against the

¹ Millne v. Wood, 5 C. & P. 587.

upon a certified copy of a mere decretal order or rule of a court of chancery, directing him to attach the body of a party, and detain him in close custody till he shall comply with certain requirements of the court. *Leighton v. Hall*, 31 Ill. 108.

In treating of the wrong of *false imprisonment* — chap. 6 — we have considered at some length the right of arresting, with or without process, upon the charge or suspicion of crime. A few miscellaneous cases on the same subject may be added in the present connection. See *State v. Lafferty*, 5 Harring. 491; *Shafer v. Mumma*, 17 Md. 331.

The liability to arrest without warrant for common-law felonies remains unchanged by Michigan Comp. L. § 5954. Rev. Sts. of 1846, c. 161, § 18. *Drennan v. People*, 10 Mich. 169.

An officer, knowing of the issuing of a warrant to arrest a man for felony, may lawfully make the arrest in a proper manner, without having at the moment the warrant in his possession. But in order to place the man under any obligation to submit to the arrest, the officer should inform him of the facts, or at least of the offence. *Ib.*

If a prisoner, lawfully arrested without a warrant by order of a justice, for an assault committed in his presence, escapes, a constable may be ordered by the justice, without a warrant, to pursue and retake him; and, after demand and refusal of admission, may break doors for the purpose. *Com. v. M'Gahey*, 11 Gray, 194.

A justice may issue a second commitment in place of a defective one previously issued, provided he have any record or entry to which he can refer; but he cannot resort merely to his own recollection for the facts. *Branigan*, 19 Cal. 133.

As to arrest in a *dwelling-house*, upon a criminal warrant, see *Com. v. Irwin*, 1 Allen, 587.

A constable received a warrant for arrest, and, being himself unable to execute it, delivered it to another constable, who gave it to one not a constable, and deputed him to execute it. Held, the second constable had no authority under the warrant,

and therefore could not depute it. *State v. Ward*, 5 Harring. 496.

For an offence committed in court, a magistrate may order an instant arrest without affidavit or warrant. *Lancaster v. Lane*, 19 Ill. 242.

A constable cannot, without a warrant, arrest a person guilty of a past offence, unless such offence amounts to a felony. *Commonwealth v. Carey*, 12 Cush. 246; *Same v. McLaughlin*, *Ib.* 615.

A peace officer, such as a constable or sheriff, has the right to arrest, even without warrant, a person concerned in a breach of the peace or other crime; or when he has reasonable ground to suspect the party of such offence. *State v. Brown*, 5 Harring. 505.

An officer, making an arrest by virtue of a warrant, is not bound to exhibit his warrant and read it to the prisoner before securing him, if he resists. *Commonwealth v. Cooley*, 6 Gray, 350. See *State v. Wetherall*, 5 Harring. 487.

Neither the mayor and aldermen of a city, nor a surveyor of highways, have power to order a party to be arrested for creating a nuisance, by placing a post in the street. *Donovan v. Jones*, 36 N. H. 246.

Constables and police officers have power to arrest in many cases, upon their own view of an offence committed; as, at common law, for breaches of the peace, and by statute, for breach of police regulations; but they have no such power in a case of placing a nuisance, not specified in the police law, in a highway. *Ib.*

In Pennsylvania, in misdemeanors, the means provided, for the arrest and return of *fugitives from justice*, is a warrant issued by a justice, of the peace of the county where the offence is alleged to have been committed, and indorsed by a justice of the county where the offender is found. *Commonwealth v. Jailer*, 1 Grant, 218.

The court of quarter sessions of one county have no power to order a defendant, charged with a misdemeanor, to be committed in default of bail for his appearance at the next court of quarter sessions of another county. *Ib.*

In New York, if, after an entry without force, a justice is satisfied that the persons he finds are gambling, they can be arrested without a warrant. *Willis v. Warren*, 1 Hilt. 590.

sheriff for an unauthorized requisition of bail. Thus a defendant, being arrested under a judge's order, proposed to the plaintiff to accept bail, which was accordingly done forthwith, and the bail were examined as to their qualifications, their depositions were written and signed, and then delivered to the defendant's attorney, to be attested in the usual manner before a commissioner. After the examination, the plaintiff's attorney indorsed, on an undertaking produced by the defendant, the words "we approve of the within undertaking, and are satisfied with the sureties;" and the defendants were thereupon discharged from arrest. Held, the above acts of the defendant assumed that it was proper to require bail, and were a waiver of any objection to having been held to bail.¹

§ 4. It was formerly held, that an action on the case will not lie against the sheriff, though he take *insufficient bail*; but that he shall be *amerced*, if the defendants do not appear.² But it is a well settled rule of American law and practice, that an action lies against the sheriff for taking insufficient bail;³ and damages may be assessed according to the plaintiff's real loss, owing to the sheriff's neglect.⁴ Thus if a sheriff knowingly take insufficient bail, it is held that he is liable for the amount of the plaintiff's judgment against the bail, deducting the probable value of that judgment, and of the judgment against the principal.⁵ So it is said, "bail is still regulated by the statute 23 Hen. VI. c. 10, which has always been recognized in the United States as Common Law. The first branch of this statute, for it consists of only one section, requires the sheriffs to 'let out of prison, &c., upon reasonable *sureties*, &c., having sufficient, &c.'"⁶ Hence, if only one surety be taken, the sheriff is at all events responsible for his sufficiency; though the bond is not thereby avoided.⁷ (a) And slight evidence of the insufficiency of bail is sufficient, upon the general ground that the defendant, having himself taken them, is presumed to have the means of proving their ability.⁸ So the

¹ Dale v. Radcliffe, 25 Barb. 333.

² Ellis v. Yarborough, 2 Mod. 177.

³ 2 Mass. 188. See Young v. Hoemer, 11 Mass. 89.

⁴ Shackford v. Goodwin, 13 Mass. 187.

⁵ Gerrish v. Edson, 1 N. H. 82.

⁶ 2 Greenl. Ev. § 586, n. 4.

⁷ 2 Saun. 61 d. n. 5; Long v. Billings,

9 Mass. 479; Glezen v. Rood, 2 Met. 490.

⁸ Saunders v. Darling, Bull. N. P. 60; 2 Greenl. Ev. § 586.

(a) In South Carolina, a sheriff may take as bail one not a resident of his district, and having no property therein. Dickison v. Coward, 3 Rich. 49.

So he is not bound to take more than one person as bail; unless he knows, or under the circumstances should have known, him to be insufficient. Bennett v. Brown, 5 Rich. Law, 347.

plaintiff need not prove knowledge of the bail's insufficiency.¹ Thus the sheriff is liable for taking a forged bail bond, though he believed it genuine.² And the plaintiff need not have actually proceeded against the bail.³ And, on the other hand, where he takes an assignment of the bail bond from the sheriff, and sues the bail to insolvency, this is no discharge of the sheriff's liability for taking insufficient bail, nor an estoppel of the plaintiff's right of action against him.⁴ But it is sufficient to show that the bail were at the time apparently responsible, or that he used a reasonable discretion.⁵ And it is held, that, where the plaintiff neglects for five years to call on the officer for bail, the lapse of time is sufficient to exonerate the officer.⁶

§ 5. An officer is also liable to an action, for failing to *return* a bail bond with the writ, where the law so provides. If he deliver or offer to deliver it to the plaintiff, in season for the plaintiff to prosecute a *scire facias* against the bail, the sheriff is liable for nominal damages only.⁷ In an action by a judgment creditor against the sheriff, for not delivering over the bail bond, the debtor having avoided on the execution, it is held that the sheriff cannot show, in mitigation of damages, that the debtor has been insolvent from the time of the rendition of the judgment.⁸ Nor is it necessary to allege, that an execution against the debtor was returned *non est inventus* within a year after judgment; nor that such person had avoided; nor that the plaintiff, or any one in his behalf, made the oath required by statute to warrant an arrest.⁹ So, where the sheriff has falsely returned that he took bail, in an action for refusing to deliver the bail bond to the creditor, he is liable to the full amount of the judgment, and cannot show the inability of the debtor to pay it; because this would be no defence for the bail themselves.¹⁰ But if an officer, having a writ against a debtor in extreme sickness and poverty, and having arrested him, untruly returns that he has taken bail; in an action for false return, he may show these facts, in mitigation of damages, and that the

¹ Sparhawk v. Bartlet, 2 Mass. 188; Concanen v. Lethbridge, 2 H. Bl. 36.

² Marsh v. Bancroft, 1 Met. 497.

³ Young v. Hosmer, 11 Mass. 89.

⁴ Bennett v. Brown, 1 Strobb. Law, 303.

⁵ Jeffery v. Bastard, 4 Ad. & Ell. 823; Hindle v. Blades, 5 Taun. 225. (These were replevin cases. The statute required 'two responsible persons.' "The mis-

chief before the statute was, that the sheriff used to accept mere men of straw for sureties." Per Mansfield, C. J., 5 Taun. 227.)

⁶ Gill v. Stebbins, 2 Paine, C. C. 454.

⁷ Glezen v. Rood, 2 Met. 490.

⁸ Seeley v. Brown, 14 Pick. 177.

⁹ Prescott v. Bancroft, 1 Met. 500.

¹⁰ Simmons v. Bradford, 15 Mass. 83.

debtor, having recovered his health, did not conceal himself; and the jury may lawfully give nominal damages only.¹ (a)

§ 6. Another form of liability of officers, is for an *escape*. "Every liberty given to a prisoner, not authorized by law, is an escape."² Thus, if a coroner, having an execution against a deputy jailer, arrests him, and the sheriff is not at the jail, nor any keeper authorized by him; the coroner, leaving his prisoner at the jail-house, is discharged, and the sheriff is guilty of an escape.³ So it is an escape to make a prisoner for debt a turnkey, and intrust him with the keys of the outer and inner doors, at all times, by day and night. Or to commit a jailer to his own jail, appointing no new keeper.⁴ So it is an escape if a prisoner go into the country and wander about freely, though he afterwards return.⁵ And if the sheriff permit a debtor, who has been surrendered by his bail, and by the Court committed to the custody of the sheriff, to go at large before the expiration of thirty days; he shall be chargeable for an escape, although he was not furnished with a copy of the order of Court committing such debtor.⁶ So the sheriff is chargeable for an escape, if he give a prisoner the liberty of the yard on a bond, in a penal sum less than double the amount of the sums for which he is imprisoned, as required by law, although approved by two justices according to the statute.⁷ So a sheriff is liable for the escape of a debtor committed on mesne process, although the creditor, while the suit was pending, procured an amendment of his declaration, which entitled him to enhanced damages; at least to the extent to which he would have been lia-

¹ Weld v. Bartlett, 10 Mass. 470.

² Per Parsons, C. J., Colby v. Sampson, 5 Mass. 312. See Rose v. Green, 1 Burr. 437; Farrar v. Barnes, 12 Rich. 224.

³ Colby v. Sampson, 5 Mass. 310.

⁴ Steere v. Field, 2 Mason, 486.

⁵ Nall v. State, 34 Ala. 262.

⁶ 2 Mass. 549.

⁷ Clapp v. Hayward, 15 Mass. 276.

(a) In North Carolina, upon exception taken to the bail returned by the sheriff, in order to charge him, there must be notice and a judgment declaring the insufficiency of the bail, and adjudging that the sheriff stand as special bail prior to the trial and judgment in the principal suit. Worth v. Winbourne, 7 Jones, 431.

In New York, where the sheriff arrests a defendant under an order, duly made under § 179 of the Code, and allows him to go at large, on executing the proper bond, with sureties who fail to justify on being excepted to; and the plaintiff recovers judgment for the value of the property, and damages for the detention thereof, with costs: he

may maintain an action against such sheriff to recover the amount of the judgment, after an execution against the property of the defendant has been returned unsatisfied. It is not necessary that an execution against the body of such defendant, nor a writ *de retorno habendo*, be issued, and returned unsatisfied. Gallarati v. Orser, 4 Bosw. 94.

Under the statute (Code, § 201) which provides, that, "if, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail;" the liability of the sheriff is the same as that of the bail would have been, if they had justified. *Ib.*

ble, if no amendment had been made.¹ So, in an action under the New York Code, brought against a sheriff for the escape of a debtor imprisoned on a *ca. sa.*; the liability of the sheriff is like that of bail. It is not a defence, either total or partial, that the debtor at the time of such escape was insolvent.² So a debtor's insolvency is no defence, and therefore an answer relying on it is demurrable; if available, it is only in mitigation of damages.³ Nor is it any defence, as is sometimes held, that the prisoner was privileged from arrest.⁴ (But see § 6 b.) Nor that the execution was issued, before one against property had been issued and returned unsatisfied, as the *ca. sa.* is not thereby rendered void.⁵ So an action on the case will lie against a sheriff, for refusing to assign to the creditor, upon request, after breach of condition, a jail bond, taken upon admitting the debtor to the liberties of the prison. And where such bond was taken, upon the commitment of the debtor on mesne process, it is no excuse for the sheriff, that, pending the suit, the plaintiff, by leave of Court, added a count for a new and distinct cause of action, and that his judgment was rendered for a sum in damages, founded upon claims embraced in both counts. The surety in the bond can alone insist upon such matter in avoidance of the bond.⁶

§ 6 a. In an action against an officer, for an escape by a debtor whom he has arrested on mesne process, the plaintiff need not prove an entry of the original writ; and a declaration averring the commencement of an action by writ returnable to the court of common pleas, "as by the record of the same writ, in the same court remaining, more fully appears," is sustained by proof that the writ was returned by the officer to the clerk's office, and placed in the files of non-entries.⁷

§ 6 b. But it is not an escape, if the door of a prison, in which a debtor was confined under a *ca. sa.*, is permitted to remain open, the debtor not leaving the prison.⁸ So an officer, having a debtor in custody, may allow him reasonable liberties; and the debtor cannot set up such liberties as an escape, provided there be no abandonment of the arrest.⁹ So where a debtor, while at large within the prison-limits, had been employed by the jailer to render

¹ *Vilas v. Barker*, 20 Verm. 603.

² *McCreery v. Willett*, 4 Bosw. (N. Y.) 643.

³ *Barnes v. Willett*, 35 Barb. 514.

⁴ *Gill v. Miner*, 14 Ohio St. 182.

⁵ *Renick v. Orser*, 4 Bosw. 384.

⁶ *Ibid.*

⁷ *Whithead v. Keyes*, 1 Allen, 350.

⁸ *Currie v. Worthy*, 2 Jones, 104.

⁹ *Butler v. Washburn*, 5 Fost. 251.

sundry services in connection with the care of the jail, being sometimes intrusted with the keys, and sometimes taking charge of the prisoners when conducted to or from the jail, but which services were rendered under the supervision of the jailer, and all within the prison liberties; it was held, that such employment of the debtor by the jailer did not constitute a voluntary escape.¹ And, somewhat contrary to cases previously cited, in an action against the sheriff for an escape, it is held a defence, that the party was illegally held in custody.² As in case of one arrested on a process void because the statute granting it had not been complied with; the rule, that a ministerial officer is protected by the writ of a competent court, good on its face, being held a rule of protection merely, and personal to the officer.³ And, in general, an officer is not liable for the escape of a debtor, whom he has arrested on a process which was insufficient to authorize the arrest.⁴

§ 7. If a party be in custody on final process, he may be *re-taken* after a *negligent* escape; but not after a *voluntary* escape.⁵ And if, in the latter case, the creditor will not authorize a recapture, this is not such a discharge of the debtor from imprisonment as will discharge the debt, and the sheriff will be liable for it.⁶ And the magistrate, before whom the debtor is brought upon the second arrest, has no jurisdiction to determine upon the right of the officer to make it.⁷ But it is a justification to the bailiff against an action of false imprisonment, that he retook a prisoner before the return of the writ on mesne process, though he had voluntarily permitted him to go at large after the first arrest.⁸ (a) And where the sheriff arrested a defendant by virtue of a *ca. sa.*, and in good faith released him by taking bond for his appearance at court, to take the benefit of the act for the relief of honest debtors, in an amount less than twice the amount of the creditor's demand; held, he was not guilty of a voluntary, but of a negligent

¹ Bolton v. Cummings, 25 Conn. 410.

² Carpentier v. Willet, 6 Bosw. 25.

³ Tuttle v. Wilson, 24 Ill. 553.

⁴ Hitchcock v. Baker, 2 Allen, 431.

⁵ Butler v. Washburn, 5 Fost. 251; Bruce

v. Snow, 20 N. H. 484; 6 Allen, 260. See Weaver v. Commonwealth, 29 Penn. 445.

⁶ Jackson v. Hampton, 6 Ired. 34.

⁷ Doane v. Baker, 6 Allen, 260.

⁸ Atkinson v. Matteson, 2 T. R. 172.

(a) An action on the case lies against a jailer, for voluntarily permitting the escape of a prisoner confined on mesne process, though the prisoner returns to prison on the same day, and the plaintiff proceeds to final judgment against him. Ravenscroft v. Eyles, 2 Wils. 294.

If a person, being arrested, escapes from the officer without questioning his authority, he has not that right to the same extent upon a re-arrest. State v. Phinney, 42 Maine, 384.

escape, and might retake the defendant in a *ca. sa.*, and surrender him in court, in discharge of his liability to an attachment for contempt.¹ So where a sheriff's officer kept the defendant in custody after return of the writ, and then committed him to prison; held, no action would lie for an escape.² (a)

§ 8. In an action for an escape, the sheriff cannot take advantage of an *irregularity* or *error* in the process, which does not render it void.³ But he may show want of jurisdiction in the Court.⁴ Or that the process was void.⁵ (b) Thus a sheriff is not liable for an escape, where his prisoner is discharged, on *habeas corpus*, by the Supreme Court commissioner, in a case where such commissioner has jurisdiction, although his decision is erroneous.⁶ And, to render a sheriff liable for the escape of an insolvent surrendered in open court, it is necessary to show that such insolvent was committed to his custody by an order of the Court. A mere prayer to that effect is not sufficient.⁷

§ 9. An officer, being liable for suffering an escape, is of course authorized to use force to prevent it. And where, in an action for assault and battery, the defendants justified under process, and it appeared on the trial, that the injuries complained of were committed on a recaption of the plaintiff, after one escape, and in efforts to overcome resistance, and to prevent another; the plaintiff alleging that *excessive force* was used; it was held, that the *onus* was on him to prove that the force was excessive.⁸ But an officer is not

¹ Colley v. Morgan, 5 Geo. 178.

² Planck v. Anderson, 5 T. R. 37.

³ Spafford v. Goodell, 3 McLean, 97.

⁴ Bull. N. P. 656; Blasel v. Kip, 5 Johns. 89; Yelv. 42 a, n. 1; Carth. 148;

Albee v. Ward, 8 Mass. 79; Bushe's case, Cro. Eliz. 188.

⁵ Howard v. Crawford, 15 Geo. 423.

⁶ Wiles v. Brown, 3 Barb. 37.

⁷ Siler v. McKee, 2 Jones, 379.

⁸ Henry v. Lowell, 16 Barb. 268.

(a) If a party who is in custody, accused or convicted of a criminal offence, escapes, he may be recaptured at any time afterwards, whether the escape is voluntary or involuntary on the part of the sheriff. Commonwealth v. Sheriff, 1 Grant, 187.

It is held that, under an indictment for a negligent escape a voluntary escape may be shown, as the latter includes the former. Wall v. State, 34 Ala. 462.

In an action for the escape of a prisoner committed on a *ca. sa.*, and duly admitted to the jail liberties, where the escape counted on is alleged and proved to have occurred in August, 1855, it is no defence, that in January of that year there was a prior escape, if it appears that the prisoner voluntarily returned into custody and contin-

ued there until the second escape, and it does not appear that the plaintiff had any notice of the first escape before the return of the prisoner into custody, and although the action is brought more than a year after the first escape, and the defendant pleads the statute of limitations. Renick v. Orser, 4 Bosw. 384.

(b) A jailer is not liable for an escape, for not detaining a debtor, who is committed upon what appears, from the copy left with the jailer at the time of commitment, to be a void process. He is not bound to look beyond his copy. As where the copy showed that the original process was a writ of summons. Kidder v. Barker, 18 Verm. 454.

bound to call for aid in the service of mesne process, and is not liable for an escape that might have been prevented by his calling for aid.¹ Although he is bound to use all reasonable and proper personal exertions to secure the party; and if, in the opinion of the jury, he has not done so, he may be held liable for an escape, though he used all such exertions as he deemed necessary at the time.²

§ 10. The amount of *damages* for an escape depends somewhat upon the form of action and the nature of the escape. In an action of *debt* for an escape, the measure of damages is the amount of the judgment.³ This action, however, has been expressly abolished in some of the United States. And it is said, the action of *debt* for an escape is founded upon two English statutes. A distinguished Judge remarks, "there does not seem any reason to suppose that debt was a remedy for an escape, at the common law; for, according to all analogies of that law, it lay not in cases of tort, but of contract only, where the claim was for a sum certain; and it seems impossible to conceive that the injury to the plaintiff, in cases of escape, could always be a sum certain. From the nature of the case, it is a tort, and sounding in damages, and perpetually varying in measure and extent. The statutes of West. and 2 Rich. II. were, in my judgment, introductive of new law."⁴ In conformity with these views it is held, that, in case of voluntary escape, the amount of the judgment is the measure of damages.⁵ So, that when a creditor fails to collect the amount due on a jail bond, by reason of the poverty of the signers, he may sustain case against the sheriff, as for an escape; and the rule of damages is the amount of the debt. And the poverty of the signers is sufficiently proved by evidence that they have removed from the State, leaving no property within the State, from which the collection of the debt could be enforced.⁶

§ 10 a. But, on the other hand, the general rule is, that only the actual damage can be recovered;⁷ predicated upon the amount of the party's property.⁸ And, upon this principle, no action lies for an escape on mesne process, unless the plaintiff could have

¹ Whithead v. Keyes, 3 Allen, 495.

² Ibid.

³ 2 Greenl. Ev. § 599.

⁴ Per Story, J., Steere v. Field, 2 Mas. 513.

⁵ Patten v. Halsted, Cox, 277.

⁶ Wheeler v. Pettes, 21 Verm. 398.

⁷ Potter v. Lansing, 1 Johns. 215; Russell v. Turner, 7 Ib. 189; Governor v. Matlock, 1 Hawks, 425; Colby v. Sampson, 5 Mass. 310; Rawson v. Dole, 2 Johns. 454; Taylor v. Commonwealth, 3 Bibb, 356; State v. Baden, 11 Md. 317.

⁸ Spafford v. Goodell, 3 McLean, 97.

maintained the original action.¹ Nor, if the party is afterwards in custody, without proof of actual damage.² But the admissions of the defendant in the original suit may be proved, to show a cause of action in such suit; even though after the escape. And the judgment obtained against him in the original suit, although by default, is admissible in evidence for the same purpose.³ Even in case of a *voluntary* escape of a debtor committed on *mesne process*, the defendant may prove, in mitigation of damages, that the debtor was unable to pay the debt.⁴ So, in reference to *the burden of proof*, in an action for the escape of a debtor committed on execution, the plaintiff is not entitled to recover the whole amount of his debt, unless the defendant prove the debtor's inability to pay it; but only such an amount of damage upon all the evidence in the case, as he has sustained by the escape.⁵

§ 11. For the escape from jail of a debtor, under a *ca. sa.*, nothing will excuse the sheriff but the act of God or the public enemy.⁶ The insufficiency of the jail is no defence.⁷ So a voluntary return before suit brought is not a defence in an action for an escape, whether negligent or voluntary, on *mesne process*, after return of the writ.⁸ Nor an unreasonable delay of the creditor, after being apprised of the escape, to call for an assignment of the bond; if the sheriff were also apprised of the escape.⁹ (a) So, where a defendant detained under *mesne process* escaped, and the sheriff obtained leave to appear and defend the original suit, and judgment was recovered on a declaration filed against the original defendant; held, the plaintiff did not thereby elect to consider the defendant in custody, nor to discharge the sheriff; for the proceed-

¹ *Riggs v. Thatcher*, 1 Greenl. 68.

² *Planck v. Anderson*, 5 T. R. 37.

³ *Hart v. Stevenson*, 25 Conn. 499.

⁴ *Brooks v. Hoyt*, 6 Pick. 468.

⁵ *Chase v. Keyes*, 2 Gray, 214.

⁶ *State v. Halford*, 6 Rich. Law, 58.

⁷ *Kepler v. Barker*, 13 Ohio, St. 177.

⁸ *Stone v. Woods*, 5 Johns. 182. See *Richmond v. Tallmadge*, 16 Johns. 308; *Drake v. Chester*, 2 Conn. 473.

⁹ *Wheeler v. Pettes*, 21 Verm. 396.

(a) Nor, in an action against a party liable for the forthcoming of an execution debtor, is it necessary that demand should have been made upon the defendant for the body of the debtor, on the execution issued in the original suit. Nor that the defendant should have had notice, that the execution was in the hands of an officer for service. Nor that the officer serving such execution should have retained the same during its life, to give the defendant a better opportunity to render the body of

the debtor; the only rule being, that he should conduct fairly, and use due diligence to arrest the debtor, and return the execution in a reasonable time; and the question whether he has done so being wholly one of fact for the jury. And where the defendant has not tendered the body of the debtor within the life of the execution, he cannot complain that it was prematurely returned. *Hart v. Stevenson*, 25 Conn. 499.

ing was wholly void, except to ascertain the extent of the sheriff's liability.¹ But it is held that the sheriff may prove in defence, that the debtor was *rescued* in going to jail.² (a)

¹ *Scarborough v. Thornton*, 9 Barr, 451.

² Bull. N. P. 68.

(a) In an action for rescue, the return of the officer, that he had arrested the body of the debtor, and that he was rescued by the defendant, is not conclusive evidence of the fact. *Francis v. Wood*, 28 Maine, 69.

And, in a late case, where a defendant in a *ca. sa.* bond was arrested by a constable and rescued by a mob, it was held, that this was an escape. *Abbott v. Holland*, 20 Geo. 598.

In an action against a sheriff for an escape suffered by his deputy, the return of a rescue upon the writ is not conclusive evidence in favor of the defendant. *Whithead v. Keyes*, 3 Allen, 495.

An officer, who has negligently permitted an escape of a debtor whom he has arrested on mesne process, is not liable, if he retakes the debtor upon fresh pursuit, and the debtor then forcibly rescues himself, or is forcibly rescued by others. *Whithead v. Keyes*, 1 Allen, 350.

In an action against the sheriff for an escape, he is not bound by the recital in

the prisoner's petition for his discharge under the Insolvent Debtor's Act, but may show the contrary. *McKenzie v. Barnes*, 12 Rich. 205.

Where the sheriff is liable for having negligently permitted a slave to escape from his custody, whereby such slave was drowned; the proper measure of damages will depend upon the interest, whether a life-estate or otherwise, of the owner in such slave. *Tudor v. Lewis*, 3 Met. (Ky.) 378.

A prisoner in a house of correction, under sentence, and kept in one of the usual cells in solitary confinement for refractory conduct, conformably to the rules, cannot maintain an action against the master for neglect to provide sufficient food, clothing, and fires, without evidence of malice or of such gross negligence as proves malice. *Williams v. Adams* (Mass.), Law Reg. May, 1862, p. 436.

CHAPTER XXXII.

MISCELLANEOUS PUBLIC OFFICERS.

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|--------------------------------|--------------------------|
| 1. General official liability. | 7. Highways. |
| 2. Clerks of courts. | 9. Military officers. |
| 3. Voting. | 10. Miscellaneous cases. |
| 4. Taxes. | |

§ 1. It remains very briefly to notice the rights and liabilities of some other *public officers*. It is remarked in general terms, that, "if a *public officer* abuses his office, either by act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer."¹

§ 2. Questions, similar to those which relate to sheriffs, charged with the execution of civil or criminal process, sometimes arise in reference to other *ministerial officers of courts*. Thus an action on the case was brought against a clerk of the Insolvent Debtors' Court, for wrongfully, maliciously, falsely, and unlawfully making out an order, purporting to be an order of that Court for the discharge forthwith of an insolvent debtor, who was adjudged by the Quarter Sessions to be detained in custody for two years at the suit of the plaintiff; with an averment, that the Insolvent Debtors' Court did not pronounce any such order, or give any authority to the defendant to write, make out, or issue the same, whereby the prisoner was discharged forthwith, and by means whereof the plaintiff was injured, and had lost all means of enforcing payment of the debt and costs due to him from the prisoner. Upon writ of error, held, that the supposed order of the Insolvent Debtors' Court was not to be understood as the order of that Court, until set aside, and that the declaration was not demurrable, for not averring that it was set aside.²

¹ Per Best, C. J., *Henly v. Mayor, &c.*
5 Bing. 107.

² *Whitelegg v. Richards*, 3 Dowl. & Ry.
237.

§ 2a. A town-clerk inadvertently gave a defendant a false certificate, officially attested, to support a plea of infancy, whereby the plaintiff was obliged to obtain a continuance of the cause. Before the next term, the defendant died. Held, the clerk was liable for the damages caused by such continuance and delay.¹

§ 3. Questions sometimes arise as to the rights and duties of officers in connection with the privilege of voting. (See i. 87 and n.) Thus an action on the case lies by a burgess against the returning officer of a borough, for refusing his vote at an election of members of Parliament.² Though it is held, that in such an action *malice* must be proved as well as laid. If a returning officer, without malice or any improper motive, but in the honest exercise of his judgment, refuse the vote of one entitled to vote at an election; no action can be maintained.³ But, it seems, a charge that the defendant, knowing, &c., and wrongfully intending to deprive the plaintiff, &c., hindered him from giving his vote, &c., is a sufficient allegation of malice.⁴ So, in Massachusetts, where a person who had been a member of a voluntary religious society demanded permission to vote, at a meeting of the first parish in the town where he dwelt, and produced to the presiding officer a certificate of the clerk of the voluntary society, that he had ceased to be a member thereof; it was held, that he was entitled to vote at the parish meeting (being otherwise duly qualified), and that an action lay against the presiding officer, for refusing to receive his vote.⁵ (a)

§ 4. *Taxation* gives rise to another class of rights and liabilities; whether in reference to the officers who *impose* or *assess*, (b) or

¹ Maxwell v. Pike, 2 Greenl. 8.

² Ashby v. White, 1 Brown, P. C. 62.

³ Tozer v. Child, 40 Eng. L. & Eq. 89; 1 E. 563.

⁴ Drewe v. Coulton, 1 E. 563. See People v. Pease, 30 Barb. 588; State v. Hart, 6 Jones, 389.

⁵ Oakes v. Hill, 10 Pick. 333.

(a) It is competent for selectmen, although not their duty, to add the name of a legal voter to the voters' list after the voting commences; but they cannot during such time hold a regular meeting for the correction of the list. Waite v. Woodward, 10 Cush. 143.

An action lies against an election inspector for unlawfully preventing a party from voting. Anderson v. Milliken, 9 Ohio, 568.

Though a party produce to selectmen *prima facie* evidence of a right to vote, he can maintain no action for the refusal of

his vote, if in fact he had no such right. The only effect of the late statutes upon the subject (in Massachusetts) is, to exempt selectmen from liability without the production of *prima facie* evidence, but not to preclude them from going behind such evidence, and showing the actual absence of the right. Lombard v. Oliver, 3 Allen, 1.

(b) In Massachusetts, assessors are liable, notwithstanding Rev. Stats. c. 7, § 44, for assessing, and issuing a warrant for the collection of, a school district tax, if the school district was not legally organized,

those who *collect* them. Thus trespass lies against selectmen for seizure of person or property, made to enforce payment of a tax illegally assessed.¹ So trespass is the proper form of action to be brought against the trustees of a school district, by one, against whom they have illegally assessed and ordered to be collected a school tax.² So case lies against selectmen for illegally assessing and collecting taxes.³ (a) The plaintiff must prove the election and qualification of the defendants by the records. Secondary evidence is admissible, only upon proof that the records are lost or missing.⁴ So the declaration alleged, that the defendants illegally and without right made a tax or assessment upon the plaintiff's poll and estate. Held, this averment was not supported by evidence merely that they assessed such tax. No presumption arises from the mere fact of an assessment, that it is unlawful.⁵

§ 4 a. But, in an action against an assessor, for an imprisonment of the plaintiff for non-payment of a school district tax, alleged to be illegal for want of legal school districts in the town; if the arrest is admitted or proved, the burden is on the defendant to prove that the entire town was legally districted by territorial limits. This burden is not shifted, by proof of the existence of districts *de facto* for more than forty years throughout the entire town; nor by proof that a town record book, now lost, contained a record of a districting of the entire town; it not appearing that such record was made after the statute which required territorial districts.⁶

¹ Osgood v. Blake, 1 Fost. 550.

² Crandall v. James, 6 R. I. 144.

³ Osgood v. Clark, 6 Fost. 307; Perry v. Buss, 15 N. H. 222.

⁴ Griffin v. Rising, 2 Cush. 75.

⁵ Perry v. Buss, 15 N. H. 222.

⁶ Bassett v. Porter, 10 Cush. 418.

although it was certified to them, by one acting as clerk of the district, that the tax had been voted by the district. Dickinson v. Billings, 4 Gray, 42.

So assessors, who place upon their roll the name of a person not liable to taxation in their town or district, in consequence of which his property is levied upon for the taxes, are responsible to him for damages. Mygatt v. Washburn, 1 Smith, N. Y. 316. See Herrinan v. Stowers, 43 Maine, 497.

But assessors, in deciding the question of residence with reference to taxation, act *judicially*, and, so acting within the extent of their authority, are not liable to an action, though they err in judgment. Brown v. Smith, 24 Barb. 419.

If a district clerk, in giving notice of a special district meeting regularly called by the trustees, misrepresent the object of the meeting to some of the taxable inhabitants, who in consequence thereof omit to attend, and a district tax is voted at such meeting; the trustees, who cause the tax to be collected, are not thereby rendered trespassers, unless they are parties to the fraud. Randall v. Smith, 1 Denio, 214.

(a) In case, the *unlawful assessment* being the gravamen of the action, the particular matter in which the unlawfulness consists should be set forth and proved specifically. Nor will the introduction of general averments of the illegality, &c., change the burden of proof. 15 N. H. 222.

§ 5. An unauthorized sale of property by a *collector of taxes* amounts to a conversion, and the owner may maintain trover against him.¹ And where a collector, by virtue of an assessment warrant, levied upon the goods of a person not named in the warrant nor liable to pay the assessment, threatened to remove the goods, and gave him notice that he would sell on a day specified, if he did not previously pay; held, payment, made when the collector was about to remove the goods for sale, was not voluntarily made, and the collector was liable in trespass.² So, in an action for assault and battery and false imprisonment, where the defendants, by plea, attempted to justify, under a warrant of distress for the collection of taxes, and it appeared by the plea that the warrant was attempted to be executed more than three years after it was delivered to the collector, and no sufficient excuse was set forth for such delay; held, the plea was fatally defective, unless the defect was supplied in the replication.³ So the heirs at law of an estate gave a chaise and money belonging to the estate in exchange for another chaise. A collector of taxes sold the chaise, as the property of the heirs, for non-payment of an illegal tax assessed against them. Held, that trespass would lie in favor of the heirs against the collector, and, as the administrator had not ratified the sale, and as no persons in interest had objected, that the defendant could not now object to the right of the plaintiff to maintain the action; also, that, as the tax was illegal, the possession of the plaintiffs was sufficient to enable them to maintain trespass against the defendant, who had no right to take the property.⁴

§ 6. Questions also arise, in reference to the title of property illegally taken for taxes. Thus A, residing in another State, owned a building in Lawrence, in Massachusetts, standing by consent on the ground of another person. The building was taxed to A, in Lawrence, as real estate belonging to a non-resident, but was subsequently sold by the tax-collector as personal property. Held, the purchaser was liable in trespass for entering the building without A's consent.⁵ But a deed, duly acknowledged and registered, from an officer whose duty it is to sell land for non-payment of

¹ *Thompson v. Currier*, 4 Post. 237.

² *Wetmore v. Campbell*, 2 Sandf. 341.

³ *Shaw v. Peckett*, 25 Verm. 423.

⁴ *Pickering v. Coleman*, 12 N. H. 148.

⁵ *Flanders v. Cross*, 10 Cush. 514.

taxes, gives a title sufficient to enable one holding under the grantee to maintain trespass against a mere stranger.¹ (a)

§ 7. In New York, no action will lie against an *overseer of highways* (see chap. 84), in favor of a private individual, for an injury sustained in consequence of the neglect of the overseer to keep a bridge in repair. The party injured can sue only for the statutory *penalty*, for each neglect or breach of duty. And, if an action would lie, it must be on the statute; and the declaration ought to state specially the cause of action arising under the statute, and every fact necessary to enable the Court to judge whether there has been a breach of duty. Not, generally, that the defendant was an overseer of highways, and wilfully neglected his duty and suffered the bridge to remain out of repair, whereby the plaintiff's horse fell through, &c. And such a declaration is not aided by a verdict; being the case, not of a title defectively set forth, but a total defect of title.²

§ 8. A surveyor is justified in executing an order of a county court, having jurisdiction, requiring him to open a road, though such order is irregularly made.³ But under the statute requiring road-warrants to be signed by the supervisors, a copy of a warrant signed by them, made at their request by their clerk, but not in their presence, will not justify an officer in proceeding under it.⁴ (a)

§ 9. Cases may also arise, involving the rights and duties of *military* officers. Lord Mansfield is reported thus to have charged a jury: "In trying the legality of acts done by military officers in

¹ *Wentworth v. Blanchard*, 37 Maine, 14.

² *Bartlett v. Crozier*, 17 Johns. 439.

³ *Yeager v. Carpenter*, 8 Leigh, 454.

⁴ *Mericle v. Mulks*, 1 Wis. 366.

(a) It is held in Michigan, that trespass does not lie against a supervisor of taxes, for errors or defects in the description of real estate on the assessment roll. *Clark v. Axford*, 5 Mich. 182.

In Ohio, where a county auditor places property subject to taxation on the duplicate within proper time, and assesses it according to St. 1852, § 46, without notice to the interested party, the treasurer is not a trespasser in collecting such tax, unless the want of notice is disclosed by the duplicate, or known to him. A county treasurer is protected by his duplicate, under the same circumstances as an officer by process. *Champaign, &c., v. Smith*, 7 Ohio (N. S.), 42.

In Indiana, where trespass is brought

against a supervisor, executing powers given by the Rev. Sta. 1843, he is bound to show that he acted in good faith, and in a proper discharge of his duty to the public. *Conwell v. Emrie*, 4 Ind. 209.

(b) In Indiana, where parties open a road under an order of commissioners, void on its face, proceedings before them are inadmissible to mitigate damages, in an action of trespass for such opening. *Barnard v. Haworth*, 9 Ind. 103.

In an action of trespass against an overseer of highways, he cannot justify by showing an order from the commissioners to open a road, unless it be shown to have been legally laid out. *Guptail v. Telf*, 16 Ill. 363.

the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright. It is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There the principal inquiry to be made by a court of justice is, how the heart stood? and if there appear to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong, — if cruelty, malice, and oppression appear to have occasioned or aggravated the imprisonment or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape, under the cover of a justification the most technically regular, from that punishment, which it is your province and your duty to inflict on so scandalous an abuse of public trust.”¹ So the defendant went to the place of rendezvous for the impress service, and gave information that the plaintiff, being at a certain house, was liable to impressment and a fit person for the service; in consequence of which the plaintiff was seized by the press-gang and carried on board the tender, where he was detained, until it was ascertained that he had never been before in a ship but once, which was also a case of unlawful impressment. Held, a proper case for an action of trespass and false imprisonment. Lord Ellenborough remarked: “This is not like a malicious prosecution, where the party gets a valid warrant or writ, and gives it to an officer to be executed. There was clearly a trespass here in seizing the plaintiff, and the defendant, therefore, was a trespasser in procuring it to be done; nor is any proof of malice necessary.”² So case or trespass lies against a military officer, for a seizure of goods or arrest of the person, by virtue of a warrant for a fine, illegally issued by such officer.³ So replevin lies, for property taken by virtue of a warrant, issued by a court-martial of the United States, to the marshal of the district, to collect a fine imposed by the sentence of the Court upon the plaintiff, as a private in the militia of the State of New York, for refusing to rendezvous and enter the service, in obedience to the orders of the command-

¹ Wall v. M’Namara, cited 1 T. R. 536.

² Bixby v. Harris, 6 Fost. 125.

³ Flewster v. Royle, 1 Camp. 187.

er-in-chief of the militia, &c.¹ But, where a soldier had been arrested and committed to the custody of the commandant of a garrison, who ordered him to do certain duty which was reasonable, and warranted by military usage; it was held that the disobedience of the soldier justified the officer in commanding him to be tied to a gun; and that it was a defence to an action for false imprisonment.² (a)

§ 10. It has been held, that an action on the case will not lie at common law against a *returning officer*, for falsely returning a candidate for a seat in Parliament.³ But, in general, case will lie for a false return in the matter of an election to an office.⁴ So an action on the case lies against the *commissioners of a lottery*, for not adjudging a prize to the holder of a ticket entitled to receive it.⁵ Or against a *postmaster* for not delivering a letter on request, though no particular damage accrued. Otherwise if the letter had been tendered, and the plaintiff would not pay the postage.⁶ So a notary public, who undertakes to protest a note and notify the parties, for a compensation, is liable, if he negligently fails to give due legal notice.⁷ So if a notary, in taking the acknowledgment of a deed, neglect to state in his certificate that the party was personally known to him, or properly identified, he is guilty of gross negligence, for which he is responsible.⁸ It is no excuse, that the blank certificate had been partly filled up by the grantee's attorney. It is the duty of the notary, to see to it that the certificate is correct. It is as faulty to sign without reading it, as to sign an incomplete one.⁹ So an *officer of customs* is liable in trespass for a wrong seizure of goods, and carrying them to the king's warehouses, notwithstanding probable cause.⁹ And an officer of the revenue, seizing goods as forfeited, and causing them to be libelled and tried, in an action of trespass by the owner, can only

¹ Mills v. Martin, 19 Johns. 7.

² Schuneman v. Diblee, 14 Johns. 235.

³ Prideaux v. Morrice, 7 Mod. 14.

⁴ Reg. v. Heathcote, 10 Mod. 48.

⁵ Schinotti v. Bumsted, 6 T. R. 646.

⁶ Edwards v. Dickenson, 12 Mod. 6.
See 3 How. U. S. 97.

⁷ Bowling v. Arthur, 34 Miss. 41.

⁸ Fogarty v. Finlay, 10 Cal. 239.

⁹ Leglise v. Champante, 2 Str. 820.

(a) A recent case in Massachusetts (Ela v. Smith, 5 Gray, 121) has settled several important principles, in reference to the respective and concurrent rights and duties of the civil and military authorities of a city, a State, and the United States, in case of riotous resistance to the execution of civil process of the United States Court.

The case was one of peculiar interest and notoriety, as it pertained to the exciting subject of the rendition of a fugitive slave; but, as it turned, to a great extent, upon the construction of a State statute, does not require to be cited at length in the present work.

plead a condemnation, or an acquittal with a certificate of probable cause.¹ (b)

¹ *Gelston v. Hoyt*, 13 Johns. 561.

(b) Trespass does not lie against excise officers, who enter into a person's house by virtue of a legal warrant to search for smuggled goods, although none such be found. Nor are the defendants bound to show reasonable grounds of suspicion. But case lies for maliciously obtaining or

executing the warrant. *Boot v. Cooper*, cited in 1 T. R. 535; 4 Doug. 339. An importer can maintain trover against a collector of customs who unlawfully detains goods, notwithstanding the instructions of the secretary of the treasury. *Fiedler v. Maxwell*, 3 Blatch. 552.

CHAPTER XXXIII.

JOINT TORTS OR WRONGS.

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| <p>1. Mutual rights and liabilities of parties jointly interested, as between themselves and in reference to others.</p> <p>2. Suit of one joint owner against another. — Sale or destruction of the property.</p> <p>3. Members of a voluntary association.</p> <p>4. Tenants in common of real property; possession of one, when adverse to another.</p> | <p>5. Third person claiming under one tenant in common.</p> <p>7. Suits by and against joint parties against or in favor of third persons.</p> <p>16. Conspiracy.</p> <p>20. Election of remedies; several suits; verdict, damages, costs, &c.</p> |
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§ 1. HAVING completed our view of torts or wrongs, consisting in a violation of the duties incident to *public* relations, we proceed to consider those connected with *private* relations. And one of the most obvious and frequent relations of this class, — including, also, or alike applicable to, all or most others, — is that of a *joint* interest, claim, or liability, in connection with the subject-matter of suit. This relation may be brought in question, in suits between the parties jointly concerned, themselves, or between them, or one or more of them, and third persons.

§ 2. It was formerly held, as a general rule, that one joint-tenant, tenant in common, or coparcener, cannot maintain trespass or trover against his companion; although he might maintain such action against a stranger, unless the joint-tenancy be pleaded in abatement.¹ The rule is still in force to the extent, that trespass does not lie, except for *mesne profits* or the destruction of the property.² (a) Also, that trover does not lie between joint-tenants, &c.,

¹ Brown v. Hedges, 1 Salk. 290.

² Bennet v. Bullock, 35 Penn. 364; Critchfield v. Humbert, 39 Penn. 427.

(a) And where one of two tenants of common land, being in the sole possession, proceeded to clear all the arable land, and by a succession of crops wore it out, and left no timber to repair fences; held, the remedy was not an action on the case, in the nature of waste, but an action of account, or a bill in equity for an account. Darden v. Cowper, 7 Jones, 210.

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against cutting timber trees, on land owned by the plaintiffs and defendants in common, does not lie, without an averment of the insolvency of the defendants, or that they had cut or disposed of timber to an extent exceeding their share of the estate. Hihn v. Peck, 18 Cal. 640.

Recovery in trover by one joint tenant against the other has the effect of a partition of the whole property, if the defend

unless the joint property is *destroyed*,¹ or *sold*.² Or, that one tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it as to amount to a destruction of it, or something equivalent, mediately or immediately;³ or to an exclusion of the plaintiff's right;⁴ or to render it impossible that the plaintiff should ever take and use it. The party must have used it otherwise than in the usual and legitimate mode.⁵ Thus the conversion of a chattel by a tenant in common to its general and profitable application, though it change the form of the substance, is not such a destruction of the subject-matter as to prevent the plaintiff from taking and using it in its altered state; therefore it creates no right of action.⁶ So the secret removal of entire chattels by one tenant in common, without the consent or knowledge of the other, and for the purpose of selling them, and applying the proceeds to his own use, does not amount to a conversion; nor is it an unlawful act, for which the co-tenant can maintain an action at law, even although the removal has created a lien on the chattels by a third party.⁷ So one tenant in common cannot maintain trover against his co-tenant, for crops in which they have a joint interest, until a separation or severance by the parties, or until such a conversion as goes to the destruction of the crop, or the entire exclusion of the co-tenant from the enjoyment of his right and interest therein.⁸ (a) So the owner

¹ *Lucas v. Wasson*, 3 Dev. 398; *Campbell v. Campbell*, 2 Murph. 65; *Leonard v. Scarborough*, 2 Kelly, 73; *Roston v. Morris*, 1 Dutch. 173; *Barton v. Burton*, 1 Williams, 93.

² 8 Barb. 585.

³ *Roston v. Morris*, 1 Dutch. 173; *Heath v. Hubbard*, 4 E. 110.

⁴ *Allen v. Harper*, 26 Ala. 686.

⁵ *Dodd v. Watson*, 4 Jones Eq. 48.

⁶ *Fennings v. Ld. Grenville*, 1 Taunt. 241; *Mayhew v. Herrick*, 7 Com. B. 229.

⁷ *Jones v. Brown*, 38 Eng. L. & Eq. 304.

⁸ *Carr v. Dodge*, 40 N. H. 403; *Keiser v. Earnest*, 21 Penn. 90.

ant so desire; and, in that case, if the plaintiff has exclusive possession of more than his share, he cannot recover, though the defendant has such exclusive possession of another portion, as amounts to an ouster of his co-tenant, and a conversion. *Roddy v. Cox*, 29 Geo. 298.

(a) If one having no interest in, or possession or control of a chattel, owned by two others in common, sell an undivided half of it to one of the owners, who thereupon carries it out of the State; the other tenant in common cannot maintain trover against such third person in consequence of such sale. *Bates v. Marsh*, 33 Verm. 122.

Where the nature of the action itself implies the continued existence of the property, and the defendant's present possession of it; the exception to the general rule stated in the text, against the right of action between joint owners, is of course inapplicable. Thus one tenant in common of a chattel cannot maintain *detinue* for such chattel against his co-tenant. *Bonner v. Latham*, 1 Ired. 271.

So, where several have interest in a deed, the title to the possession of it is *ambulatory*; and any of the parties interested, having possession, may retain it against the other. *Foster v. Crabb*, 11 Eng. L. & Eq. 521.

And, upon similar ground, where one

farming with the tenant on shares cannot maintain trover for his share of the products, without proof that the latter has sold or destroyed them.¹

§ 2 *a*. But, as already suggested, if the subject-matter be actually *destroyed* by one tenant in common, trover will lie against him by his co-tenant. And, where one tenant in common, the defendant, forcibly took a ship out of the possession of the other, the plaintiff, and secreted it from him, so that he knew not where it was carried, and changed the name of it, and it afterwards got into a third person's hands, who sent it on a foreign voyage, where it was lost; it was held to be properly left to the jury, whether the destruction was not by the defendant's means.² So one tenant in common of personal property has no right to *sell* the property. He can only sell his own interest; and, if he undertakes to sell the entire property, he is liable to an action of trover, at the suit of his co-tenants; or they may sue, or take the property from the purchaser.³ (*a*) The assuming to own or sell the whole is sufficient evidence of conversion.⁴ So a disposition to one's "own use" is held to be a conversion, whether by a tenant in common or otherwise.⁵ Or removal of the property, and using it for private purposes of his own; as in case of a machine for manufacturing lumber.⁶ So one tenant in common may maintain an action for conversion against another, who takes possession of *shot iron*, jointly owned by them, mixes it with other iron, and manufactures the mixture into various iron wares, making it impossible to trace or identify the iron, and sells or disposes of the wares.⁷

¹ Williams v. Nolen, 24 Ala. 167.

² Barnardiston v. Chapman, cited in 4 E. 121. See Fiquet v. Allison, 12 Mich. 328.

³ White v. Brooks, 43 N. H. 402; Tyler v. Taylor, 8 Barb. 585; Perminter v. Kelly, 18 Ala. 716.

⁴ Wheeler v. Wheeler, 33 Maine, 347; Smyth v. Tankersley, 20 Ala. 212; Weld v. Oliver, 21 Pick. 559.

⁵ Webb v. Mann, 3 Mich. 139.

⁶ Benedict v. Howard, 31 Barb. 569. But see 4 Jones, Eq. 48.

⁷ Redington v. Chase, 44 N. H. 36. *der*

of two jointowners of a vessel took upon himself the management, direction, and control of the whole vessel, and, by his carelessness, inattention, and negligent and improper conduct, the vessel took fire and was consumed; it was held that he was not liable to the other joint owner, even though he assumed the management, &c., without the license or consent of the other. Moody v. Buck, 1 Sandf. 304.

(*a*) It has however been said, that one tenant in common of a chattel cannot maintain trover for it against his co-tenant *while the right of reversion remains*; otherwise, when that right has been put an end to by

the act of the co-tenant. Thus, w^h vessel belonging to part-owners w^h lading bly taken by the minority out of ad their session of the majority, and sent: it was eign voyages, on one of which it was entirely lost; held, that tro^u the basin, maintained. Knight v. Cos^{mt} of his lot, R. 53. See 4 E. 110. his neighbor's

One co-tenant, who has not occupying timber from the land, lot in its appropri- defence that the other permanent obstruc- so, and that the pres^{ed} waters of the basin, proportion of the pier, an action on the sale. Dwinell v. Ained. Beach v. Child,

not sue his fellow, except in case of *actual ouster*, either proved or admitted by the pleading.¹ And one cannot be ousted by the other, except by a notorious and continued possession, unequivocally hostile,² or an act inconsistent with the plaintiff's right in the premises.³ The burden is on the party alleging an ouster, to prove it. There must be an actual ouster, either forcible, or in some way brought home to the knowledge of the plaintiff as an ouster. It cannot arise from mere possession, when both tenants suppose the whole title to be in the possessor.⁴ Thus, where a tenant in common mortgaged the whole estate, and remained in actual possession, and there was evidence that he did not intend to oust his co-tenant; it was held that the mortgage did not operate as a constructive ouster, if the mortgagor's intention was not to hold adversely to his co-tenant; and that the question of intention should be left to the jury.⁵ And trespass does not lie by one tenant in common against another, for disturbing a temporary rightful possession.⁶ Thus one tenant in common of a saw-mill cannot maintain this action against another, for his entry into the entire common property and exclusive occupation thereof.⁷ Nor can trespass for mesne profits be maintained by one tenant in common against another, without an actual ouster.⁸ Nor will a constructive ouster, by an heir claiming the whole estate under a supposed devise, sustain an action of trespass brought against him by the co-heir.⁹ So trespass *qu. cl. fr.* cannot be maintained by one tenant in common of land against another, for entering upon the common property under a claim of exclusive ownership of the whole, and cutting and carrying away all the timber thereon.¹⁰

§ 4 *a.* But a tenant in common of land, actually ousted or expelled from his possession by a co-tenant, may maintain trespass *qu. claus.* against him, although the defendant admits the right of the plaintiff, and offers to account.¹¹ So the owner of real estate, in possession, may maintain trespass against one also in possession, and claiming title as a tenant in common with him.¹² And

¹ Halford v. Tetherow, 2 Jones, 393.

² Peck v. Ward, 18 Penn. 506; Gill v. Fauntleroy, 8 B. Mon. 177.

³ Lawton v. Adams, 29 Geo. 273.

⁴ Van Bibber v. Frazier, 17 Md. 436.

⁵ Moore v. Collishaw, 10 Barr. 224; 44 N. H. 572.

⁶ Duncan v. Sylvester, 1 Shep. 417.

⁷ Porter v. Hooper, 1 Shep. 25.

⁸ Ibid.

⁹ Allen v. Carter, 8 Pick. 175.

¹⁰ Wait v. Richardson, 33 Verm. 190.

¹¹ McGill v. Ash, 7 Barr. 397; Murray v. Hall, 7 Com. B. 441. See Brown v. Combs, 5 Dutch. 36; Owen v. Morton, 24 Cal. 376; Thornton v. York, &c. 45 Maine, 158; Wright v. Saddler, 20 N. Y. (6 Smith) 320.

¹² Hunting v. Russell, 2 Cush. 145.

although a defendant may have a right of possession as tenant in common, yet, in trespass *qu. claus.*, a plea of soil and freehold is not supported by evidence of such tenancy.¹ So a tenant in common can bring ejectment, when there is an actual ouster.² Adverse possession, by a joint-tenant, from the commencement of the other's claim, is a disseisin.³ Stronger evidence is required than in case of a stranger. But when some of the co-tenants are turned out, and the others, being thereupon placed in possession, continue to hold the land, such holding must be considered adverse.⁴ The possession of one tenant in common may become antagonistic, and exclusive of a co-tenant, and will become so, by an unequivocal and notorious denial of the right of the co-tenant, and a refusal to pay him any part of the profits.⁵ So a joint owner, holding possession adversely to his co-owners, and in such a manner as to apprise them of the adverse nature of his possession, by lapse of twenty years acquires a separate right, available against them, and sufficient to maintain an action for possession in his own name.⁶ And although the perception of the entire profits by one tenant in common is not, of itself, sufficient to divest the possession of his co-tenant, nor are acts of ownership by one tenant in common necessarily to be construed into acts of disseisin; yet an undisturbed and peaceable occupancy of the premises by one for nearly thirty years, under an exclusive and notorious claim of title, without any payment of rents and profits, or any acknowledgment of the right of the other, is sufficient to raise the presumption of an actual ouster. So, where one tenant in common of an equitable title, after the abandonment of possession by both, and their removal from the State, returned and made a new and distinct contract of purchase with the vendor, from whom he received a deed to himself individually, which he had duly recorded; the mere fact that he, about the same time, caused the original unexecuted contract, under which he and his co-tenant previously held, to be spread upon the record, is not sufficient to rebut the presumption of an adverse possession arising from a long-continued, notorious, and peaceable occupancy under the new purchase.⁷ So where the plaintiff claimed the whole premises, and

¹ *Roberts v. Dame*, 11 N. H. 226.

² *Johnson v. Swain*, Busb. 335. See 8

Cross v. Robinson, 21 Conn. 379.

³ *Brock v. Eastman*, 2 Wms. 658.

⁴ *Barret v. Coburn*, 3 Met. (Ky.) 510.

⁵ *Abercrombie v. Baldwin*, 15 Ala. 363;

8 B. Mon. 177.

⁶ *Russell v. Marks*, 3 Met. (Ky.) 37.

⁷ *Johnson v. Toulmin*, 18 Ala. 50.

alleged a wrongful entry and eviction, which allegations were denied by the defendant, and it appeared that a demand had been made and refused, and also that one entitled as heir to part had conveyed the premises by a warranty deed to one who took possession claiming the whole; held, sufficient evidence of ouster.¹ So, where a married woman, who was a parcener, united with her husband in a deed, and purported to convey the whole estate in fee in lands, and their grantee took possession under the deed, and held for more than twenty years; it was held that an ouster might be presumed, and the other parcener barred.² (a)

§ 5. A third person may sometimes set up the title of one tenant in common, and an authority from him, in justification of what would otherwise be an unlawful interference with the prop-

¹ Wright v. Saddler, 20 N Y. (6 Smith) 320. ² Gill v. Fauntleroy, 8 B. Mon. 177.

(a) With reference to the exercise of the mere right of possession, as between tenants in common; if there be two tenants in common of a *folding*, and one by force prevent the other from erecting hurdles, trespass lies. Co. Lit. 200 b.

Where certain hay, belonging to A and B, was deposited in the barn of B, with the consent of A; it was held that A had no right to break and enter the barn, for the purpose of carrying away the hay or any part of it; and that such breaking and entering was a trespass. Crocker v. Carson, 33 Maine, 436.

But one tenant in common of a barn-floor has no right to use force and violence to prevent his co-tenant from entering the door leading to the floor, though such entry is with the declared purpose of removing the wagon of the former then standing on the floor. Commonwealth v. Lakeman, 4 Cush. 597.

The following miscellaneous examples further illustrate the mutual rights and liabilities of parties jointly interested:—

One claiming a privilege in a well and pump situate in the land of another, each being bound to contribute his proportional part of the repairs, can have no action against the latter for neglect to repair, until after a request and refusal. Doane v. Badger, 12 Mass. 65.

The subject of *waste*, as between tenants in common (see *Waste*), is very generally regulated by statute in the United States.

At common law, one tenant in common was not liable to his companion, either for waste or the profits of the joint estate, although he embezzled the profits or appro-

priated the whole to himself. Shiels v. Stark, 14 Geo. 429.

One tenant in common could not maintain an action on the case in the nature of waste against another, in possession of the whole, and having a demise of a moiety from the plaintiff, for cutting down trees of proper growth and age for cutting. Otherwise, if unfit to be cut. Martin v. Knowllys, 8 T. R. 145.

It is not a trespass for the owner of land to take away the *fence* separating it from the land of another, for the purpose of rebuilding it with other materials. Burrell v. Burrell, 11 Mass. 294.

In reference to this peculiar subject of ownership as between tenants in common, it is remarked: "Where the subject of the action (trespass) is a *partition fence* between the lands of two adjoining proprietors, it is presumed to be common property of both, unless the contrary is shown. If it is proved to have been originally built upon the land of one of them, it is his; but if it were built equally upon the land of both, though at their joint expense, each is the owner in severalty of the part standing on his own land. If the boundary is a hedge and one ditch, it is presumed to belong to him on whose side the hedge is; it being presumed that he who dug the ditch threw the earth upon his own land, which alone was lawful for him to do, and that the hedge was planted, as is usual, on the top of the bank thus raised. But if there is a ditch on each side of the hedge, or no ditch at all, the hedge is presumed to be the common property of both proprietors." 2 Greenl. Ev. 507

erty. Thus a party put in possession of, or allowed to occupy, a portion of premises by one tenant in common, cannot be sued as a trespasser by another, without notice to quit, or other act, showing a termination of this license or tenancy.¹ So one cannot eject a person in possession by leave of the other.² So a tenant in common has no right to inflict a battery upon one who enters upon the land under the authority of the co-tenant; and, in this respect, there is no distinction between the co-tenant and one entering with him, and under his authority.³ So one tenant in common has no right to seize to his own use ores mined by a lessee of his co-tenant.⁴ But in some cases a third person cannot avail himself of a mere wrong or neglect, as between the tenants themselves. Thus where one of several tenants in common, of the right to dig and remove ore from another's land, enters and digs and removes ore therefrom, the owner of the land cannot maintain trespass against him, on the ground that he did not first give notice to his co-tenants, according to the provision of a statute, of his intention to enter, &c.⁵

§ 6. In regard to *creditors* of a joint owner or tenant in common, this peculiar form of ownership of course does not exempt property from a liability for debts. (a) It is to be observed, however,

¹ Ord v. Chester, 18 Cal. 77.

² M'Gavnell v. Murphy, 1 Hilt. 132.

³ 4 Dev. & B. 246.

⁴ Blewett v. Coleman, 40 Penn. 45.

⁵ Arnold v. Stevens, 1 Met. 266.

(a) Where the interest of one tenant in common has been conveyed to a third person, a creditor of such tenant, who claims the conveyance to be fraudulent and void, has no legal interest in the common estate, until he has appropriated the same, or some portion thereof, to the payment of his debt, or has instituted some proceedings for that purpose. *Staples v. Bradley*, 23 Conn. 167.

A and B being entitled to a remainder in slave property, expectant on a life-estate, a *fi. fa.* was sued out against A, and levied on some of the slaves then in his possession, by consent of the tenant for life, and the slaves were sold by the sheriff. A then conveyed all his estate to a trustee for the benefit of his creditors. After the death of the tenant for life, in a suit brought by the trustee against A and B for partition, the slaves so sold by the sheriff were allotted to the trustee, the purchaser at the sheriff's sale not being a party to that suit. In an action of detinue, by the executor of the purchaser against the trustee, for such

slaves; held, at the time of the levy and sale by the sheriff, the debtor had no several property in any particular slaves, and so no title passed; and the subsequent division, in the suit to which the purchaser was not a party, did not give him a legal title to the slaves so purchased. *Leslie v. Briggs*, 6 Leigh, 6.

If, pending an attachment of personal property, in a suit against a tenant in common, the co-tenant makes a division of the property, and takes one half, he is liable to the officer in trover, although the officer sells the other half, and applies all the proceeds to the execution. *Reed v. Howard*, 2 Met. 36.

Substantially the same rules have been applied to *partners* as to tenants in common. Where a sheriff sells the property of a partnership as the individual property of one partner, he is liable in trover to the other for his undivided share in the property, without regard to the state of the partnership accounts. *Walsh v. Adams*, 3 Denio, 125.

in reference to the rights of the party owning in common with a debtor, that, while an officer may lawfully take possession of property owned by tenants in common, by virtue of an execution against one of them, and sell the interest of that one, and deliver the property to the purchaser; he cannot lawfully sell the share of the other tenant in common, but would by that act become a trespasser *ab initio*, at least so far as it respects that share of the property¹ and liable to the other part-owner in trover or trespass, at his election.² But not at the suit of both.³ But if the sheriff sells only the undivided moiety or interest of the debtor, the purchaser becomes a tenant in common with the other tenant; who cannot, therefore, maintain trespass or trover against him, the tenancy in common not being destroyed or severed by the sale.⁴ So, A and B being joint owners of carding machines, A sold his half to C, and B and C agreed to work them together. Afterwards B delivered the machines to a sheriff, who took and sold them on an execution against A. In an action of trover brought by C against B for his half of the machines; held, the sale from A to C did not sever the tenancy in common, and trover would not lie.⁵

§ 7. With regard to *suits brought by parties jointly interested against third persons*, (a) it is held that tenants in common must

¹ Waldman v. Broder, 10 Cal. 378; Lothrop v. Arnold, 25 Maine, 136; Edgar v. Caldwell, 1 Morris, 434; Renton v. Chaplain, Stockt. 62; Hill v. Wiggins, 11 Fost. 392; 34 Ala. 652.

² Melville v. Brown, 15 Mass. 82; Ladd

v. Hill, 4 Verm. 164; Bradley v. Arnold, 16 Verm. 382.

³ Sheppard v. Shelton, 34 Ala. 652.

⁴ Mersereau v. Norton, 15 Johns. 179; Fiero v. Betts, 2 Barb. 633.

⁵ St. John v. Standing, 2 Johns. 468.

After an act of bankruptcy committed by one partner, the other delivers goods of their joint property to a creditor for a joint debt, and dies; and afterwards a commission issues against the surviving partner. Held, that the creditor, by such delivery, became tenant in common of the goods with the assignees, by relation, from the act of bankruptcy; and the assignees could not maintain trover against him. *Smith v. Oriell*, 1 E. 368.

After an act of bankruptcy committed by one of two partners, joint effects were sent away, which came to the defendant's hands. Then the solvent partner died, leaving the defendant his executor; and afterwards a commission of bankrupt was taken out against the surviving partner, and his estate assigned to the plaintiffs. Held, they were tenants in common with the solvent partner, and, after his decease, with

his representatives, by relation from the act of bankruptcy, and could not therefore maintain trover against the defendant claiming under such solvent partner. *Smith v. Stokes*, 1 E. 363.

The possession of indivisible personal property (a horse) by one tenant in common is that of all. Upon a sale of his interest by a tenant in common out of possession, the possession of the other tenant becomes that of the purchaser. And such possession is sufficient, as against a levy by an execution creditor of the vendor. *Brown v. Graham*, 24 Ill. 628.

(a) Upon this subject, the following distinctions in reference to different classes of wrongs are laid down by an approved writer on pleading. It will be seen by the cases referred to in the text, that this statement presents a substantially complete and accurate view of joint rights and liabilities,

join in all personal actions concerning the common property.¹ As in an action for nuisance to land.² Or in a complaint for flowing by a mill-dam.³ So where injury to joint property is alleged in a complaint, and it is averred that one of the joint owners has *assigned* his claim therefor to the other, who brings his action for damages in his own name alone; the complaint is demurrable.⁴ And in many cases they *may* join, though they might also bring separate actions. Thus a separate possession, by several tenants in common, of the common territory, but without the intention of entirely severing the tenancy, will not prevent their joining in an action for a trespass upon one divided portion.⁵ So where the owner of lands agrees with another, that he may sow the land on shares, they may maintain a joint action of trespass against a third person who cuts and carries away the corn.⁶

§ 7 a. And it may be further remarked, though not strictly pertaining to the subject of joint or common title, that; if two persons have an *entire joint damage*, they *may* bring a joint action, though their interests are several.⁷ It is said, "There seems to be no reason why different plaintiffs who have different rights should not sue the same defendant in respect of separate injuries, though arising out of one transaction."⁸ Thus different persons, owning separate tenements affected by a nuisance, may join in a suit to restrain its continuance by an injunction.⁹ So where two persons

¹ Lane v. Dobyns, 11 Mis. 105. See Boobier v. Boobier, 39 Maine, 406.

² Low v. Mumford, 14 Johns. 426.

³ Tucker v. Campbell, 36 Maine, 346.

⁴ Oliver v. Walsh, 6 Cal. 456.

⁵ Johnson v. Goodwin, 1 Williams, 288.

⁶ Foote v. Colvin, 3 Johns. 216.

⁷ Coryton v. Lithbyse, 2 Saund. 115.

⁸ Per Best, C. J., Knight v. Legh, 4 Bing. 589.

⁹ Peck v. Elder, 3 Sandf. 126.

in relation to the forms of proceeding:— For injuries to the person, several persons cannot in general sue jointly, as for slander, battery, or false imprisonment. To this rule, however, there are some exceptions. (See *Slander, Libel, False Imprisonment, Partners.*) 1 Chit. Pl. 54.

In actions for injuries to personal property, joint-tenants and tenants in common must join; but parties having several and distinct interests cannot in general join; as if the goods of A and B, the separate property of each, be unlawfully distrained, they cannot join in replevin. But though the interests be several, yet if the injury occasion an entire joint damage to several, they may in some cases join. As where two persons were severally seized of two ancient mills, at one or the other of

which the defendant ought to have ground his corn, but neglected to grind at either, it was decided that both might join; and where goods are bailed to two, and only one has the possession in fact, and a stranger carries them away, both may have detinue or trespass, or the one who had actual possession may sue alone. 1 Chit. Pl. 54, 55.

In actions for injuries to real property, joint-tenants and parceners must join in real as well as personal actions, or the nonjoinder may be pleaded in abatement. Tenants in common must, in general, sever in real actions; but in personal actions, as for a trespass or a nuisance to their land, they may join. A tenant in common, may, however, in general, sue separately. 1 Chit. 55, 56.

have entered lands in their individual names, and afterwards make an agreement by deed, reciting that the lands were purchased jointly "for promoting the joint interest of the parties by securing to them the timber on said lands to be sawed into plank;" the instrument will operate as a covenant, on the part of each, to stand seized to the use of the other of an individual interest in the trees growing on the lands, and will authorize the parties to maintain an action of trespass jointly for an injury to the trees.¹ But where goods had been bailed by several, upon the terms that the bailee was not to part with the possession, except upon the joint order or request of the bailors, and the bailee afterwards delivered possession to one of the bailors upon his sole request; it was held, that the bailors jointly could not maintain an action for the delivering up of the goods, without the joint order or request of the bailors.² So where one was to furnish a boat, and another take charge of it, for joint profit, a joint action may be brought for an injury to it.³

§ 7 *b*. An action cannot be maintained jointly by two plaintiffs, where the wrong done to one is no wrong done to the other. Thus where an action was brought, and a verdict obtained, by two plaintiffs against a defendant, for a malicious arrest, the declaration alleging, by way of special damage, the false imprisonment of both, as well as the expenses incurred by them; the Court ordered the judgment to be arrested.⁴ Nor can two bring a joint action for false return to a mandamus.⁵

§ 7 *c*. Tenants in common of real estate may maintain some actions relating to the property, separately; — as ejectment,⁶ or trespass to try title.⁷ So one tenant in common of land, over which the county commissioners have laid out a highway, may apply for a jury to assess his damages.⁸ So, where Maine and Massachusetts jointly made a grant of land, reserving a certain quantity for the support of schools and public worship, and the State of Maine caused the reserved part to be set off by certain prescribed proceedings; it was held, that the State of

¹ *Blackburn v. Baker*, 1 Ala. 173.

² *Brandon v. Scott*, 40 Eng. L. & Eq. 105.

³ *White v. Bascom*, 2 Wms. 268.

⁴ *Barratt v. Collins*, 10 Moo. 446.

⁵ *Butler v. Rews*, 12 Mod. 349, 371.

⁶ *Hammett v. Blount*, 1 Swan, 385.

⁷ *Croft v. Rains*, 10 Tex. 520; *Hines v. Trantham*, 27 Ala. 359; *Grassmeyer v.*

Beeson, 18 Tex. 753; *May v. Slade*, 24 Tex. 205. But they must join in actions relating to the possession merely, as that is joint, though their titles are several. Thus they must join in trespass *quare clausum*. *Ibid*.

⁸ *Dwight v. County, &c.*, 7 Cush. 533.

Maine could maintain trespass against the grantee for cutting timber on such reserved part, although the State of Massachusetts was no party to the process by which it was set off, and did not join in the suit, or interpose any claim.¹ So where a farm is worked on shares, each co-tenant is entitled to the whole of the crop as against all persons but his co-tenant, and can maintain a suit for its recovery.² So, in an action of trespass *qu. claus.*, for breaking, entering upon, and cutting and carrying away trees from land owned by tenants in common, each tenant is entitled to his several action; and it cannot be defeated by a subsequent payment to his co-tenants for the wood thus taken and carried away.³ Though it is held, that, in an action of trespass *qu. claus.* by one joint owner, he cannot recover more than his proportion of damages.⁴ (a)

§ 7 d. And under some circumstances, creating a distinct title in one owner, in addition to the joint ownership, one tenant in common of personal property may sue alone for an injury done to it. Thus a part-owner of personal property, having the possession and control of it, with power to sell, may maintain trover against a wrong-doer who converts it.⁵ So although a thing deposited by one, with the authority of another, and received by the bailee, to keep on the joint account of the two, cannot lawfully be demanded by one without the authority of the other, so as to enable him to maintain trover upon the bailee's refusal to deliver it; yet, where it had been agreed between the assignor and the assignee of a lease, that, to save the expense of a counterpart, it should be deposited in the hands of a third person, and the assignee afterwards delivered it to the bailee to keep, but without mentioning that it was on the joint account; and no communication was

¹ *Hammond v. Morrell*, 33 Maine, 300.

² *Knox v. Marshall*, 19 Cal. 617.

³ *Longfellow v. Quimby*, 29 Maine, 196; *Jewett v. Whitney*, 43 Ib. 342.

⁴ *Webber v. Merrill*, 34 N. H. 202; *Jackson v. Todd*, 1 Dutch. 121. *Contra*, *Hibbard v. Foster*, 24 Verm. 542.

⁵ *Hyde v. Noble*, 13 N. H. 494.

(a) It has been held that one or more joint tenants of slaves may maintain trover without joining the others. *Howard v. Snelling*, 28 Geo. 469.

The agent of three tenants in common, of a tract of woodland, wrongfully cut down and sold the timber, and applied the proceeds to his own use. Held, that one of the owners could not waive the tort, and maintain a separate action of assumpsit for

a share of the proceeds; the wrong-doer's legal liability being to all the tenants in common jointly, their action must be a joint one, whether sounding in tort or in contract. If such tenant in common were a married woman, the injury, before the passage of the Pennsylvania act of 1848, gave a right of action to the husband and wife, which survived to the husband at her death. *Irwin v. Brown*, 35 Penn. 331.

made of the deposit to the assignor, who never interfered further in the matter; but the defendant afterwards (with the privity of the bailee, who acted as his agent) procured an illegal and void conveyance of the property in it from the assignee: held, that the assignee, or his legal representatives, might alone maintain trover for it, after demand and refusal.¹

§ 8. It is to be further observed, that, even where an action is brought by one person, in which others should properly have been joined as plaintiffs; the objection will be waived, unless taken by *plea in abatement*.² Thus one tenant in common may maintain an action against a stranger for a conversion, and recover his separate interest, if the nonjoinder is not pleaded in abatement.³ So one of two reversioners may, during the continuance of the particular estate, maintain an action on the case for an injury to the reversion, recovering only a moiety of the damages. Unless the nonjoinder of the other reversioner is pleaded in abatement, the only effect of such nonjoinder will be to limit the damages.⁴ (a) And even for this purpose it has been held inadmissible.⁵ The objection in question cannot be taken in arrest of judgment.⁶ So, after verdict and judgment, it is too late to object, that the evidence showed that the plaintiff owned the property jointly with the defendant.⁷

§ 8 a. And another qualification of the rule of joinder is, that where one joint-owner would have no right of action, the other, having such right, may sue alone. Thus if one tenant in common sell the whole property to a stranger, trover lies against the purchaser, in favor of the others, for their share. Such sale is void as to them, and does not make him a tenant in common

¹ *May v. Harvey*, 13 E. 197.

² *Nelthorpe v. Dorrington*, 2 Lev. 113; *Addison v. Overend*, 6 T. R. 766; *Sedgworth v. Overend*, 7 Ib. 279; *Heath v. Hubbard*, 4 E. 110; *Bloxam v. Hubbard*, 5 Ibid. 407; *Wheelwright v. Depeyster*, 1

Johns, 471; *Scott v. Godwin*, 1 B. & P. 67; *Chandler v. Spear*, 22 Verm. 338.

³ *Tripp v. Riley*, 15 Barb. 333.

⁴ *Putney v. Lapham*, 10 Cush. 232.

⁵ *Zabriskie v. Smith*, 3 Kern. 322.

⁶ *Starnes v. Quin*, 6 Geo. 84.

⁷ *Rank v. Rank*, 5 Barr. 211.

(a) A joint possession of the *locus in quo*, with others, is a sufficient possession, on the part of the plaintiff, to enable him to maintain trespass *quare clausum*. *Holly v. Brown*, 14 Conn. 255.

Where several plaintiffs join in an action of trespass to try title, a deed, conveying the land in controversy to some of them, is admissible evidence for the grantees therein named; and, therefore, a motion to exclude

it may be refused. *Lindsay v. Hoke*, 21 Ala. 542.

One of several defendants in an execution may replevy property levied on, although his co-defendants do not unite with him in executing the forthcoming bond. *Sheppard v. Melloy*, 12 Ala. 561.

And, in general, the principle stated in the text applies to the action of *replevin*. *Wright v. Bennett*, 3 Barb. 451.

with them.¹ (a) So one tenant in common of personal property may sustain trover against an officer, for his undivided moiety, when the officer has sold the whole property upon execution against the co-tenant.² This exception more peculiarly applies, where the circumstances raise a doubt, whether the party defendant in such process had any interest in the property. Thus A furnished B with upper leather to be made into boots, under a parol agreement between them that the leather should remain A's until paid for. B made boots, and for a while sent them to New York to be sold by a commission merchant, who made acceptances for B alone, and made remittances to B alone. A parcel of boots, afterwards made by B from upper leather so furnished by A, were attached as B's property, and were subsequently sold as such on execution by the attaching officer. Held, that A was either the owner of the whole property in the boots, or was owner in common with B, and might on either ground maintain an action of trover against the officer for a conversion by the sale on execution.³

§ 8 b. Another qualification of the general rule is, that, although the action should properly be a joint one, yet if, by the pleadings, the defendant raises the issue of a joint title, or title in a third person; the plaintiff will prevail. Thus, in trover, the declaration stated, that the plaintiff was possessed as of his own property of four horses, which the defendant converted to his own use. Pleas, first, that they were not the property of the plaintiff; second, that a judgment was recovered against J. F., and that the defendant, an officer, seized them under an execution against J. F., the same being the goods and chattels of the said J. F., and liable to be seized and taken as aforesaid, and not being the prop-

¹ *Starnes v. Quin*, 6 Geo. 84.

² *White v. Morton*, 22 Verm. 15.

³ *Bryant v. Clifford*, 13 Met. 138.

(a) It may be remarked, that, where several parties, as required by law, join in a suit, a defence available against one alone will defeat the action. Thus, in trover, the plaintiffs claimed under a bill of sale from A, and the defendant, by virtue of a subsequent attachment, as a creditor of A. It appeared that the bill of sale was fraudulent and void as against the defendant, in relation to the interest of one of the plaintiffs. Held, the plaintiffs could not recover, although none but A participated in the fraud, or had any knowledge of it. *Pettibone v. Phelps*, 13 Conn. 445.

Where a sheriff levies on and sells land as the property of a party, who has in fact no interest in the land, but only lives on it with the real owner; a joint action, of trespass to try titles, will not lie by the purchaser, against the party as whose property the land was sold, and the real owner. The sheriff's deed, being no estoppel as against the real owner, does not, in a joint action, operate as an estoppel against the party, as whose property the land was sold. *Baukett v. Holsonback*, 2 Rich., Law, 624.

erty of the said plaintiff. Replication, that they were the property of the plaintiff *modo et formâ*. It was found by the jury, that they were the property of the plaintiff and J. F. jointly. Held, that the issue raised by the defendant was, whether the cattle were the sole property of J. F., and, the jury having found that they were the joint property of the plaintiff and J. F., that the plaintiff was entitled to recover.¹ But, in trover, where the question was, whether goods were the property of the plaintiff alone, or jointly with J. S.; held, as the plaintiff and J. S. had made joint orders for the disposition of the goods, the plaintiff alone could not recover.²

§ 8 c. Another rule, is, that, where one tenant in common sues separately in trover, and the defendant does not plead in abatement, and the plaintiff recovers his proportion of the common property; the other tenants may afterwards sue severally for their interest, and the defendant cannot plead a nonjoinder.³

§ 9. With regard to *joint liability* for torts, or actions *against joint wrong-doers*; it is the general rule, and a marked distinction between *torts and contracts*, that the plaintiff may sue any of those who committed the tort, and the nonjoinder of the others cannot be pleaded in abatement.⁴ (a) The rule is applied alike to all classes of torts, and to all forms of action, and may be found expressed in the books in a great variety of terms. Thus it is held, that, where an immediate act is done by the coöperation or the joint act of two or more persons, they are all *trespassers*, and may be sued jointly or severally; and any one of them is liable for the injury done by all, even to the extent of exemplary damages;⁵

¹ Farrar v. Beswick, 1 Mees. & Wels. 682; 2 Gale, 153.

² Nathan v. Buckland, 2 Moore, 153.

³ Starnes v. Quin, 6 Geo. 84.

⁴ Low v. Mumford, 14 Johns. 426.

⁵ Hair v. Little, 28 Ala. 236.

(a) "They who have authority over him that does the injury, and command the doing it; they who give their consent when the injury could not have been done without such consent; they who assist the principal party in doing it; or they who protect and screen him after it is over; are any of them accessories in a higher degree." 1 Rutherf. Nat. L. 407.

The distinction, however, is taken, that, where the parties committing a tort are joint owners of land, and the tort consists in the omission of some act, which, as such owners, they were bound to perform; as, for instance, for not setting out tithes, &c.;

all must be joined in the action, as in such case the title to realty will come in question; that is, whether the defendants, by reason of their ownership, were bound to perform the act, for the omission of which the action is brought. But if the act complained of consists in a malfeasance, as if the defendants have erected a nuisance on their land, no advantage can be taken of the nonjoinder, for in such case their title cannot come in question, and they are equally liable whether they have a right in the land or not. Low v. Mumford, 14 Johns. 426, 1 Chit. Pl. 78; 1 Saund. 291.

provided, however, either that they acted in concert, (a) or that the act of the party sought to be charged ordinarily and naturally produced the acts of the others.¹ So "all persons who direct or request another to commit a trespass, are liable as cotrespassers."² All who aid, command, advise, or countenance the commission of a tort by another, or who approve of it after it is done, are liable, if done for their benefit, in the same manner as if they had done the tort with their own hands.³ Thus, a person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances and approves the same, is in law deemed to be an aider and abettor, and liable as principal; and proof that a person is present at the commission of a trespass without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance, and approved it, and was thereby aiding and abetting the same.⁴ So several creditors of one debtor, who, without concert, deliver their respective writs to one officer, upon which the debtor is wrongfully imprisoned at the same time; are liable to him as joint trespassers; and consequently a satisfaction by one discharges all.⁵ So where one goes in aid of a person who commits a trespass, though he takes no further part in it, he will himself be guilty of trespass.⁶ And

¹ *Brooks v. Ashburn*, 9 Geo. 297; *Sutton v. Clarke*, 6 Taun. 29.

² Per Paige, J., *Herring v. Hoppock*, 15 N. Y. (1 Smith) 413.

³ *Judson v. Cook*, 11 Barb. 642.

⁴ *Brown v. Perkins*, 1 Allen, 89.

⁵ *Stone v. Dickinson*, 7 Allen, 26.

⁶ *Clark v. Bales*, 15 Ark. 452.

(a) The plaintiff, in an action of trespass *vi et armis*, in one count, alleging sundry wrongful acts of the defendants on one day, claimed that all the acts complained of took place on that day, in the prosecution of a concerted plan of the defendants to get the plaintiff out of the house. After the plaintiff had given evidence of an assault, by one of the defendants alone, early in the morning, she was proceeding to prove a subsequent assault by the other defendant, when the defendants objected to the latter evidence. Held, the plaintiff, under her declaration, could prove but one assault, and that the one she had elected to prove; but if the acts complained of were parts of a concerted plan of the defendants, as claimed by the plaintiff, the evidence objected to was proper. *Brown v. Wheeler*, 18 Conn. 199.

The declaration charged a joint assault by the defendants, to which they pleaded jointly not guilty, and informed the Court that this was intended to meet the declaration exactly. There was no claim by the plaintiff that one of the defendants could be subjected for an assault by the other, unless they acted in concert. The defendants claimed, and requested the Court to charge the jury, that, if they should find one defendant guilty and the other not guilty, they should render a verdict accordingly; but the Court, in view of the matters actually in controversy, submitted the case to the jury upon the evidence, directing them only, that, if they should find the facts proved, as stated in the declaration, they must return a verdict against the defendants. Held, a correct charge. *Ibid.*

if one sell timber upon land of another, and the purchaser cut and remove it; the seller is a trespasser.¹ So trespass may be maintained against a person who merely carries away the materials of a building, which has been pulled down by a trespasser.² So in trespass against three for assault and battery; plea, *not guilty*, by all; by the third, a justification in defence of his freehold; replication, that he used more force than was necessary; rejoinder, that all the defendants did not use more force than was necessary; demurrer and joinder; held, the replication was good, and the rejoinder bad.³ So A and B were tenants in common of a tract of land. A, with the assent of B, employed a surveyor to run the boundaries of their land; and, in doing so, A, accompanied by the surveying party, committed a trespass on an adjoining tract. Held, that B was equally liable for such trespass.⁴ So where several persons were engaged in playing a game of ball in the public highway, and a traveller lawfully passing thereon was accidentally struck by the ball; it was held, that they were all liable in trespass; provided, that, from the width of the road and the number of persons usually passing thereon, for the ordinary purposes of travel, the game was such as to be likely to endanger them, and that the individual by whom the ball was thrown was acting in the usual manner of persons engaged in such game.⁵ So where the defendant ascended in a balloon, which descended a short distance from the place of its descent into the plaintiff's garden; and the defendant, being entangled and in a dangerous situation, called for help, and a crowd of people broke through the fences into the plaintiff's garden, and beat and trod down his vegetables, &c.; held, that, though ascending in a balloon was a lawful act, yet, as the defendant's descent, under the circumstances, would ordinarily and naturally draw the crowd into the garden, either from a desire to assist him, or to gratify a curiosity which he had excited, he was answerable in trespass for all the damage done to the plaintiff's garden.⁶ So, where one of the defendants sold a steer running at large on the prairie to the other, and agreed to point it out on request, and pointed out by mistake a steer belonging to another man, which the other defendant killed; trespass

¹ Dreyer v. Ming, 23 Mis. 434.

² Woodruff v. Halsey, 8 Pick. 333.

³ Morrow v. Belcher, 4 B. & C. 704.

⁴ Elliott v. McKay, 4 Jones, 59.

⁵ Vosburgh v. Moak, 1 Cush. 453.

⁶ Guille v. Swan, 19 Johns. 381.

lies against both jointly ; though it would be otherwise, had the steer been pointed out by one a stranger to the bargain.¹ (a)

§ 9 a. The same principle is applied to the wrong of *conversion* and the action of *trover*. Thus a party not personally engaged in the acts of taking, using, and disposing of the property, but who co-operated with the principal actor, by aiding and abetting him in doing these acts, and subsequently recognized and approved of them ; or one who advised and assisted in the measures taken to obtain possession, and for whose benefit the acts were in part done, and who subsequently approved of and adopted them ; is chargeable with the conversion.² If goods are wrongfully taken by one party, the defendant, who has since come into possession of them, is deemed a wrong-doer as much as the original tortious taker, unless he establish his possession in good faith and for a lawful purpose.³ And, in order to constitute a joint conversion of personal property, the acts of the several defendants need not be *contemporaneous*, if their acts and purposes all tend to the same result.⁴ Nor need the party have had the exclusive control or actual *manucaption* of the goods ; but the term embraces in its legal import any intermeddling with, or dominion over the property of another, subversive of the rights of the true owner. Thus, if the defendants are actually present, aiding another in the unlawful design of removing the plaintiff's slaves from the State, with the intention of wrongfully depriving him of his property, even though it be for the use and benefit of his wife ; each act in furtherance of the common design is the act of all, and all are guilty.⁵ So, in *trover* for sheep, it was held a correct instruction, that, if the defendant was aware of the wrong of a third person, and undertook to aid him to secrete the sheep and keep them from the true owner ; or if the defendant had been indemnified, before the suit was commenced, for withholding the sheep from the true owner, and preventing her from enjoying her property ; or confederated with other parties for that purpose, and did withhold the sheep : then the jury should find the fact of conversion by the

¹ *Hamilton v. Hunt*, 14 Ill. 472.

² 19 Conn. 319.

³ *Tallman v. Turck*, 26 Barb. 167. See *Garrard v. Pittsburgh, &c.* 29 Penn. 154.

⁴ *Cram v. Thissell*, 35 Maine, 86.

⁵ *Freeman v. Scurlock*, 27 Ala. 407.

(a) In case of injury to a coach passenger by collision of the coach not lighted, with a turnpike gate not safely fastened back ; if both causes contributed to the injury, he may recover of the driver and the turnpike company. *Danville, &c. v. Stewart*, 2 Met. (Ky.) 119.

defendant.¹ So where two persons are in the joint possession of personal property owned by a third, demand of one of them will be sufficient to sustain trover against both.² So where the managing partner, conducting the business of the defendants, a mining concern, refused to deliver up ore belonging to former tenants of the mine, on the ground that it belonged to the firm, and there was a subsequent offer from the attorney of the defendants to deliver up tools that were in the same building with the ore; held, trover would lie.³ (a) So where a consignee, with power to sell, sells with intent to defraud the consignor, which intent is known to the purchaser; the seller and buyer are jointly liable in trover.⁴ So, A's horse having been stolen, B shortly afterwards bought it *bond fide* at a repository for the sale of horses, and then sent it for sale to another repository kept by C. A, having demanded the horse of C, was referred by him to B as the owner. B, when applied to, refused to give it up, and A again demanded the horse in the presence of B and C, offering them an indemnity, when they both refused to deliver it up. Held, that such refusal was evidence of a conversion, by both B and C.⁵ So the plaintiff in a prior suit, the officer, and some bidders, went to the house of the defendant in that suit, and sold her "right, title, and interest" in personal property, and the purchaser removed the goods; and the plaintiff and officer clearly intended to take and sell the property. Held, that all were jointly liable for the conversion to one holding a duly recorded mortgage of the goods.⁶

§ 9 b. The question of joint liability is *for the jury*. Thus, in trespass against two, it is properly left to the jury to decide, whether there was a joint trespass, or only one, if any, guilty.⁷ And where, in an action of trespass against two, there is any evidence from which the jury might reasonably infer the participation of one of them, it is no error to refuse to charge the jury, that they ought to find him not guilty.⁸ (b) So, in an action on the

¹ Scott v. Perkins, 28 Maine, 22.

² Ball v. Larkin, 3 E. D. Smith, 555.

³ Lloyd v. Bellis, 37 Eng. L. & Eq. 545.

⁴ White v. Wall, 40 Maine, 574.

⁵ Lee v. Robinson, 37 Eng. L. & Eq. 406; Lee v. Bayes, 18 Com. B. 599.

⁶ Underhill v. Reinor, 2 Hilt. 319.

⁷ Owens v. Derby, 2 Scam. 26.

⁸ Jones v. Welch, 15 Ala. 308.

(a) Trover will lie against different individuals for successive conversions of the same property. But the plaintiff can receive but one satisfaction. A satisfied judgment, therefore, is a bar to an action for the conversion of the same property. *Matthews v. Menedger*, 2 McLean, 145.

(b) In New York, the following somewhat peculiar and local rules have been settled in relation to the action of *replevin*, brought against several defendants. To recover possession of personal property, where a taking by one is clearly proved, it is not a ground for a nonsuit generally as

case, for conspiring to prevent the plaintiff, who was about to perform as an actor at a theatre, from acquiring fame and profit by that performance, and for hiring persons to hoot, hiss, groan, and yell at the plaintiff during the performance, and for hooting, hissing, &c., together with such persons; it was proved, that, on an occasion when the plaintiff appeared as an actor, there was a great disturbance in the theatre, consisting of hooting, &c., in which the defendants took a prominent part. The plaintiff rested his case entirely on the conspiracy. The Judge left it to the jury to say, whether what took place was the result of a preconcerted arrangement between the defendants and persons in other parts of the theatre. Held, inasmuch as the act of hissing in a public theatre is *prima facie* a lawful act, though, if done maliciously, it might be actionable, a proper direction.¹ So the plaintiff, while riding in the cars of corporation A, was injured by a collision between their cars and those of corporation B. The plaintiff brought his action against the two corporations. The finding of the jury was, that the accident was caused by the negligence of both. Held, the joinder was proper.²

§ 10. But, as already suggested, although an act done by the coöperation of several persons makes them all trespassers, and all may be sued jointly, or one is liable for the injury done by all; yet it must appear that they acted in concert, or that the act of the one sued naturally and ordinarily produced the acts of the others.³ Where two parties act, each for himself, in producing a result injurious to the plaintiff, they are not jointly liable.⁴ (a)

¹ Gregory v. Duke of Brunswick, 6 M. & G. 953; per Coltman, J., 958.

³ Guille v. Swan, 19 Johns. 381.

⁴ Bard v. Yohn, 26 Penn. 482.

² Colegrove v. New York, &c. 6 Duer, 382.

to all the defendants, that no joint taking by them was proved. But if nothing appears, either in the pleading or in the evidence, to charge a portion of the defendants, they will be entitled to a nonsuit, and the plaintiff may proceed and try the issues between him and the other defendants. And the Court may adjudge a return in favor of a part of the defendants, and refuse it as to the others. Although the jury find the exclusive possession to be in one of the defendants, they are not bound to render a general verdict in favor of all. Where, in an action to recover possession of personal property, a portion of the defendants claim the entire possession, by virtue of a chattel mortgage, in hostility both to their co-

defendant, the sheriff, and the plaintiffs, and the proof shows that the sheriff levied upon the property, and held it in suberviency to the mortgage; it is not necessary that the verdict should determine the value of the property admitted by the mortgagees to be in their possession. A general assessment of the whole value is all that is necessary. Woodburn v. Chamberlin, 17 Barb. 446.

(a) This principle has been recognized in a very recent case in Massachusetts, where a joint action was brought against a physician who prescribed, and an apothecary who put up, a noxious medicine.

More especially a person is not properly made defendant, for a cause of action in

Thus a person, to be liable as a joint trespasser, in an assault and battery, where he was not present, must be proved to have done something which led directly to the commission of the offence by another.¹ So one who is present at the commission of an assault and battery, without in any way encouraging or discouraging it, is not liable. Nor is it material, that the defendant is a selectman of the town, and participated in a public meeting held a short time before, at which a committee was appointed to visit those suspected of being disloyal, in pursuance of which the plaintiff was visited by the committee, followed by a large crowd of persons, by some of whom he was assaulted in the presence of the defendant; if it appears that at the meeting no violence was suggested or contemplated.² So, if a joint action of trespass be brought against several, the plaintiff cannot declare for an assault by one, and the taking away of goods by the others; these trespasses being of several natures.³ So although, under a declaration in trespass, that the defendants on a certain day, and on divers other days and times, between that day and another day specified, broke and entered the plaintiff's barn, and took and carried away his hay, the plaintiff may recover for as many distinct acts of trespass, as he can prove were committed by the defendants between the days mentioned; yet, if he proves several distinct acts of trespass, in some of which a part only of the defendants were concerned, he can only recover against all the defendants for those acts in which all participated.⁴ So a hirer of a slave, and one who intermeddles with the slave and puts him in jeopardy so that he is fatally injured, are not jointly liable to the owner.⁵ So where cows, belonging to several owners, are found in the garden of an individual, committing a trespass, each owner is liable for the damage done by his own cow, and for no more. And, in the

¹ Bird v. Lynn, 10 B. Mon. 422.

² Miller v. Shaw, 4 Allen, 500.

³ 2 Saun. 117 a.

⁴ Myrick v. Downer, 18 Verm. 360.

⁵ Hawkins v. Phythian, 8 B. Mon. 515.

which he has no interest, and as to which no relief is sought against him. Therefore, where the complaint alleged that one of the defendants wrongfully pledged certain securities, deposited with him by the plaintiff, to ten other defendants, stating the different contracts under which the securities were transferred to each of the defendants, separately; it was held, that the ten last named defendants were misjoined. *Lexington, &c. v. Goodman*, 25 Barb. 469.

A distinction has been made, in regard to joint liability, between an action for damages, and one for the property itself. Thus, where the defendants took from the plaintiff at the same time several negroes, each claiming and keeping possession of a distinct portion of them as his own; the plaintiff cannot maintain a joint action of detinue against them, though it seems he might have a joint action of trespass. *Slade v. Washburn*, 2 Ired. 414.

absence of all proof as to the amount of damage done by each cow, the law will infer that the cattle did equal damage.¹ So where several are engaged in the accomplishment of a lawful object, as in assisting one of them to abate a nuisance on his land; and one or more only commit a trespass in accomplishing this end; the others are not liable therefor.² So where property acquired by a trespasser comes into the possession of another, who sells it, he is not liable in trespass, unless he knew that it was wrongfully obtained, or unless it was obtained for his use by his servant, or unless he assented to the trespass. But he is liable in detinue or trover.³ And a person who knowingly receives from another a chattel, which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use.⁴ So where A took and converted the mule of the plaintiff, and sold it to B; and the plaintiff brought replevin in the detinet against B, and recovered, and then sued A for the trespass, to which A pleaded the former recovery; held, on demurrer, that the plea was not good, the original taking by A, and the detention by B, being separate causes of action.⁵ So where A allows B to use his horse and wagon and barn, for getting in and threshing grain, the title to which is in dispute between B and C; this does not implicate A as a trespasser.⁶ (a)

§ 10 a. The same rule applies to *conversion* and *trover*. Thus one, who, knowing that property is under attachment, suffers it to be sent away and sold by the owner, and receives the proceeds by virtue of a previous arrangement, is not guilty of a conversion.⁷ So, in trover against several defendants, all cannot be found guilty on the same count, without proof of a joint conversion by all. Therefore, where the plaintiff brought trover for goods against A and B, bankrupts, and C and D, their assignees, and proved that the bankrupts, before the bankruptcy, received, and afterwards disposed of the goods by way of pledge, having no authority so to

¹ Partenheimer v. Van Order, 20 Barb. 479.

² Richardson v. Emerson, 3 Wis. 319.

³ Justice v. Mendell, 14 B. Mon. 12.

⁴ Wilson v. Barker, 4 B. & Ad. 614.

⁵ McGee v. Overby, 7 Eng. 164.

⁶ Heitzman v. Divil, 11 Penn. 264.

⁷ Polley v. Lenox, &c. Am. Law Reg. Feb. 1862, p. 247 (Mass.).

(a) A placed a carriage upon one side of a street, and B, without concert with A, a team of horses on the other. The plaintiff, in passing, was kicked by one of the

horses, thrown against the carriage, and by both these causes injured. Held, he could not maintain an action against A and B jointly. Bard v. Yohn, 25 Penn. 482.

do ; and that the assignees, after the bankruptcy, took possession of the goods, and refused to deliver them to the plaintiff on demand ; and the jury found all the defendants guilty, there being only one count in the declaration : held, the evidence did not warrant such finding.¹ So where the defendant, a chemist, was in the habit of filling a soda fountain for A, who rented it with another fountain from the plaintiff, and A absconded, leaving the fountain in the possession of the defendant ; this is not a tortious conversion by the defendant.² So where the bailee of a horse sold it, as his own, to an infant, and, the owner demanding the horse of the vendee, his father advised him to retain it till he had made further inquiry ; it was held, that the father was not liable, as one who had advised or given countenance to the continuation of the unlawful detention.³ So, to maintain trover against two bailees, it is held that a demand of and refusal by one is not sufficient ; a conversion by both must be shown. Though it is otherwise in the case of *partners*, each being the general agent of the other.⁴

§ 10 *b*. The liability of several persons for the act of one has been qualified by the consideration, that their participation was through mere *mistake*. Thus, where two buy land, A to own the land, B to have the timber upon it ; and B, mistaking his bounds, cuts down timber on an adjoining lot ; A is not liable in trespass, unless he either induced it or was benefited by it.⁵ So a *contract* between joint defendants may sometimes be shown, to disprove their joint liability. Thus, in trover against two defendants, for a horse hired of the plaintiff to go to a certain place, it is competent for the defendants to prove, that, by a contract between them, one was to carry the other to such place as a passenger ; there being no direct evidence of any express hiring by the latter.⁶ And a party, though jointly liable, may sometimes be held liable only for a portion of the property wrongfully taken. Thus, where one tortiously cuts and carries away trees from another's land, and sells a part of them to one who has no knowledge of the tort ; the owner of the trees, even if he can maintain an action against them jointly, can recover of the purchaser only the value of the part of the trees purchased by him.⁷

¹ Nicoll v. Glennie, 1 M. & S. 588.

² Parkerson v. Simons, 2 M'Mullan, 188.

³ Sarting v. Saling, 21 Mis. 387.

⁴ 4 Hill, 13.

⁵ Langdon v. Bruce, 1 Williams, 657.

⁶ Adams v. Graves, 18 Pick. 353.

⁷ Moody v. Whitney, 34 Maine, 563.

§ 10 c. As has been already stated, the question of co-operation or joint participation in the wrongful act is *for the jury*. Thus in an action of assault and battery, brought by A, against B, and C who was B's bookkeeper and relative, it appeared that A came to the house of B, to settle certain debts, and for which the latter agreed to take one fourth as a composition. A, B, and C were in B's office, engaged in this arrangement for some time, when B was called to his shop, adjoining the office, to a customer, and soon after, an altercation having arisen between A and C, C committed the assault complained of, which lasted twenty minutes. It appeared, that there was no cause of quarrel immediately between A and C; that the dispute arose altogether out of the settlement; that the shop was only separated from the office by a glass door, which was partly open, and from which C called for a rope to hang the plaintiff, which was thrown to him by a person in the shop; and there was great reason to infer that B could hear, if not see, nearly all that occurred in the office. The Judge charged the jury, that, if B ordered the assault, or encouraged it, or expressed approbation of it, or gave countenance to it, or did anything to adopt it as his own, they should find a verdict against him; but added, he should be surprised if they found against B. The jury found for B. On motion to set this verdict aside, for misdirection, and as against law and evidence; held, the question for the jury was left correctly to them in the preliminary part of the charge; and, although the Court disapproved of the succeeding strong expression of opinion, that it did not amount to a misdirection, or afford ground for setting the verdict aside. Also, that the verdict was not against the weight of evidence.¹ So the question, whether a *joint conversion* is proved, is for the jury. Thus, W and R having hired of M a number of cows for a year, W took possession of and kept them on his farm, several miles distant from R's residence. A few months after the hiring, the cows were sold under an execution against W, issued upon a void judgment of a justice. At the expiration of the year, the cows being still in W's possession, M demanded them of him, and he refused to deliver them up. A like demand was made of R at his residence, who said "he would have nothing to do with the matter," and refused to go and see W on the subject. Held, in

¹ Treaner v. Campbell, 3 Irish L. R. 387.

trover against W and R, that, whether enough had been shown to prove a conversion by R, was a question for the jury, and the Judge could not properly order them to find a conversion by both; that, if R's refusal to act proceeded from an honest desire to avoid the litigation which he supposed might arise from the sale, he was not guilty of a conversion. Otherwise, if his refusal proceeded from a design to aid or countenance W in unlawfully withholding the cows, or to embarrass the latter in his endeavor to obtain possession.¹

§ 11. Upon the grounds above stated, where, in an action of trespass against several defendants, who jointly plead not guilty, a joint trespass is proved, the plaintiff cannot give in evidence, in aggravation of damages, the distinct and unconnected acts of some of the defendants.² So where the plaintiff, in an action of trover against B and C, introduced evidence proving a conversion by B only, without the participation or knowledge of C; it was held, that it was not then competent to the plaintiff to prove a distinct conversion by C.³ So, in trespass against several defendants, if a joint trespass is proved against part of the defendants only, evidence cannot afterwards be given of another trespass by all, even against such part alone.⁴

§ 12. The principle of joint liability has often been applied in reference to *officers*, acting in the execution of process. (See chap. 29.) When the original act of an officer, in the execution of civil process, is unlawful, those aiding him in the performance of it will be trespassers, though they act by his command. As where a sheriff arrested a debtor on execution, by breaking open the outer door of his dwelling-house.⁵ So the removal and the retention of the personal property of a stranger, by an officer acting by direction of the party, is a conversion by both, aside from any demand and refusal.⁶ And where the goods of one person are seized under an attachment against another, on an interpleader filed by the owner of the goods so taken, if the plaintiff in the attachment defend the interpleader, it will be evidence of his assent to the seizure by the officer, and such subsequent assent will render the plaintiff liable in trespass.⁷ So if a sheriff has wrongfully attached property, and, while the property is in his

¹ *Mitchell v. Williams*, 4 Hill, 13.

² *Higby v. Williams*, 16 Johns. 215.

³ *Forbes v. Marsh*, 15 Conn. 384.

⁴ *Prichard v. Campbell*, 5 Ind. 494.

⁵ *Hooker v. Smith*, 19 Verm. 151.

⁶ *Calkins v. Lockwood*, 17 Conn. 154.

⁷ *Perrin v. Claffin*, 11 Mis. 13.

possession, wrongfully attaches it by virtue of a second writ of attachment, by direction of the creditor in such second suit; the owner of the property may maintain trespass against the officer and the second attaching creditor jointly.¹ And where two creditors sue out separate writs of attachment against the same debtor, and put them into the hands of the same officer, who serves them at the same time, by attaching upon them the same property; they are *prima facie* jointly concerned in the taking of the property, and must be so holden, in an action of trespass brought against them and the officer for such taking; but it is competent for either of the defendants to show that he had no concern in the taking, or that the taking on the two writs was at different times.² So where the president of a bank, at whose suit an attachment had been issued, and levied on the property of the defendant, when applied to by the constable in regard to selling the property, told him to do his duty; and directed the attorney of the bank to examine the question, and the facts, in relation to a prior lien upon the goods, and to act upon his judgment; whereupon the attorney instructed the constable to sell the goods; and the president of the bank attended the sale and bid off part of the property: held, that this was sufficient to connect the president with the taking or detaining of the goods, and that he was liable in an action therefor.³ And in an action of trespass against an officer and the plaintiff in an execution, for illegally selling property under it, it is not error to instruct the jury, that they may look to the facts, that the latter was the plaintiff in the execution, and that he had just before the sale delivered to the officer a blank paper, with his signature thereon, as circumstances, in connection with the other proof, tending to show that the sale was made under his directions.⁴ So a bond of indemnity against a levy on particular property, not belonging to the execution debtor, makes the obligor a trespasser, and liable for the full value of the goods, not merely the amount realized on the sheriff's sale.⁵ More especially where property taken on execution is claimed, if the constable take a bond of indemnity from the plaintiff, and sell the property, which bond is void, they are joint trespassers.⁶ And even the sureties in a bond of indemnity, given to a sheriff,

¹ Cox v. Hall, 18 Verm. 191.

² Ellis v. Howard, 17 Ib. 330.

³ Judson v. Cook, 11 Barb. 642.

⁴ Jones v. Welch, 15 Ala. 306.

⁵ Pozzoni v. Henderson, 2 E. D. Smith, 146.

⁶ Murray v. Ezell, 3 Ala. 148.

to procure the sale under execution of property belonging to a party other than the defendant in the execution, are held liable as trespassers.¹ So the principal and surety in an indemnity bond are liable, though the property was sold after satisfaction of the execution by a sale of other articles.² So persons concerned only as appraisers in making a wrongful replevin are trespassers.³ And, upon the same principle, if one of two judgment debtors, who knows that the judgment has been paid, procure a *fi. fa.* to issue on the judgment, and assist in its execution on the other's goods; he is liable in trespass.⁴ So a justice of the peace, who issues an execution against the body of a debtor, and an attorney, who procures such execution to be issued, and causes the debtor to be arrested thereon, in a case in which both know that the law prohibits such arrest, or the issuing of such an execution; are jointly liable to the debtor in trespass.⁵ So, in Indiana, a justice of the peace who issues a writ of domestic attachment, by which the goods of an absconding debtor are attached, without requiring a bond to be previously filed according to the statute, and the party who procures such writ to be issued without first filing the bond, are trespassers, and as such liable to the party injured.⁶

§ 13. The party to a wrongful process may be sued without the officer. Thus trover lies against one who takes in execution a bankrupt's goods, without joining the officer.⁷ So a third person, aiding an officer, is thus liable. Thus one who officiously accompanied a sheriff, to aid in executing a *fi. fa.* unnecessarily, at a late hour of the night, and who, against the will of the party rightfully in possession of the property, entered his house without the command of the officer, aroused, alarmed, and insulted his family, and forcibly took the property therefrom; was held to be a trespasser, without justification or excuse.⁸

§ 14. Persons summoned by an officer to assist in the execution of legal process are justifiable in their acts, at least to the same extent that the officer would be.⁹ Thus a person, acting in aid of an officer in making an arrest, is justified in using such force as may be necessary to overcome resistance; if he uses more, he becomes a trespasser, and must, if led astray, in the opinion of the

¹ *Wetzell v. Waters*, 18 *Mis.* 396; *Herring v. Hoppock*, 15 *N. Y.* (1 *Smith*), 413.

² *Herring v. Hoppack*, 1 *Smith*, 409.

³ *Leonard v. Stacy*, 6 *Mod.* 69.

⁴ *Glover v. Horton*, 7 *Blackf.* 295.

⁵ *Sullivan v. Jones*, 2 *Gray*, 570.

⁶ *Barkeloo v. Randall*, 4 *Blackf.* 476.

⁷ *Rush v. Baker*, 2 *Stra.* 996.

⁸ *McElhenny v. Wylie*, 3 *Strobh.* 284.

⁹ *Payne v. Green*, 10 *S. & M.* 507.

jury, by his own judgment, be responsible for the consequences.¹ And, on the other hand, where one has property upon the premises of another, he may enter peaceably and take it, although he enter with an officer who has a writ of replevin which is not returned.²

§ 15. The rule, that joint defendants must have participated in the same act, is applicable to the case of officers. Thus A sued out an attachment against B, and the sheriff was directed to levy it on one half of a boat and cargo belonging jointly to B and C. A's son was present at the levy, and the sheriff took the whole boat and cargo, and forbade C's interfering with them. Held, in an action of trespass against the sheriff and A jointly, that, the attachment was a justification of the taking of all B's interest; and that A and the sheriff should not be jointly convicted, for A was not liable for the sheriff's acts in seizing property upon which no levy was directed, and the sheriff was not liable for A's trespass in suing out the attachment, or directing a levy on B's property.³

§ 16. In this connection we may properly speak of *conspiracy*; a wrong, which, from its very nature, can be committed only by more persons than one, and, by reason of the aggravation, and tendency to mischief, attaching to this peculiarity, is ordinarily made the subject of *indictment*, though it may also be the ground of civil action.⁴

§ 17. A conspiracy is not actionable, unless it affect some *legal right* of the party who brings the action. Thus the defendants, after a will had been made and executed, devising real estate to the plaintiff, conspired with each other, to induce the testator to revoke it, and effected their object by means of false and fraudulent representations. Held, the plaintiff could not maintain an action, as the revocation of the will merely deprived him of an expected *gratuity*, without interfering with any of his rights.⁵ So where the declaration charges an unlawful confederacy, to abstract money and other valuables, and apply them to the use of the defendant and another without the plaintiff's knowledge; it is necessary to prove the combination and appropriation, and also that it was

¹ *Murdock v. Ripley*, 35 Maine, 472.

² *Allen v. Feland*, 10 B. Mon. 306.

³ *Clay v. Sandefer*, 12 B. Mon. 334.

⁴ See 24 How. U. S.; *Twitchell v. Com.*

⁵ *Barr*, 211; *State v. Burnham*, 15 N. H.

396; *Herron v. Hughes*, 25 Cal. 559;

Tarns v. Lewis, 42 Penn. 409; *Com. v.*

Prius, 9 Gray, 127; *Elkin v. The People*,

28 N. Y. (1 Tiff.) 177; *Clawson v. The*

State, 14 Ohio, 234; *State v. Mayberry*, 48

Maine, 218.

⁶ *Hutchins v. Hutchins*, 7 Hill, 104.

illegal, and injurious to the plaintiff.¹ So, in order to sustain an action by a teacher against school directors for maliciously conspiring to remove her from her place; it is necessary to prove malice, an intent to injure, and an unlawful conspiracy. Without such proof, the plaintiff is properly nonsuited. Mere negative evidence of want of probable cause, by showing general good conduct and capacity as a teacher, is not sufficient proof of malice, either in the directors or the committee exercising the powers committed to them by the Board.² But a declaration in an action against two, for maliciously conspiring to injure the plaintiff, as, for example, to have him indicted for perjury; need not set out any agreement to do any act in itself unlawful, or any act lawful in itself, by unlawful means.³

§ 18. An action for a conspiracy has been held to lie in favor of a creditor, against his debtor, and a third person, who have procured the property of the debtor to be attached upon a suit on a fictitious debt, and applied to the payment of the judgment obtained in the action, in order to prevent creditors from obtaining payment out of the property; the creditor having subsequently attached the same goods, and not being able to procure payment of his debt, in consequence of the prior attachment, and the debtor being insolvent. Thus C. and G., partners, being in failing circumstances, G. made a note in the name of the partnership, for \$1,500, to P., it being agreed between G. and P. that the stock of C. and G. should be attached on the note, and the proceeds of the attachment applied ratably to the payment of the debts of G. and of C. and G. The attachment was accordingly made, and A. & Co., creditors of C. and G., subsequently, on the same day, attached the same stock in a suit for their debt. The object of the suit of P. was explained, at a meeting of some of the creditors of G., and of C. and G., on the same day, one of the firm of A. & Co. being present. P. afterwards obtained judgment on the note, and seasonably levied his execution on the attached property, which was not sufficient to satisfy the judgment, and distributed a part of the proceeds ratably among creditors of G. and of C. and G., and tendered A. & Co. a like per centage of their debt, which they refused to take. A. & Co. afterwards obtained judgment in their action, and took out execution, and delivered it to the officer who made the attach-

¹ *Kirkpatrick v. Lex*, 49 Penn. 123.

² *Burton v. Fulton*, 48 Penn. 151.

³ *Parker v. Huntington*, 2 Gray 124.

ment, but not until thirty days from the time when their judgment was obtained. The officer returned it unsatisfied. In an action, brought by A. & Co. against G. and P., for a conspiracy to prevent A. & Co. from obtaining payment of their debt out of the property of C. and G., who still remained insolvent; it was held, that the action lay, without proof of any moral fraud on the part of G. and P.; that the proceedings, in the suit on the note by P. against C. and G., were a fraud on all creditors of C. and G., who did not assent to them; that the action was not defeated, by A. & Co.'s not delivering their execution to the officer within thirty days, as he had nothing in his hands on which to levy; and that A. & Co. might maintain this action, whether the debt to them from C. and G. was payable or not at the time of their bringing the action against C. and G., on which the attachment was made.¹

§ 18 *a*. But it has been also held, that a creditor whose debt is not due cannot maintain a suit against his debtors and two other persons, for a conspiracy to enable the debtors to dispose of their property fraudulently, so as to hinder and defeat creditors in the collection of their lawful demands.² So an action on the case for fraud by combining with the plaintiff's debtor, in attaching all the personal property of the debtor for the benefit of the debtor, and concealing the same, in order to prevent the plaintiff from enforcing the payment of his debt, cannot be sustained; but the proper remedy is either to attach the property fraudulently held, charge the defendant as trustee, seek aid in a court of equity, or pursue the defendant personally under the statute, for being a party to a fraudulent judgment or fraudulent sale.³ But where a New York merchant purchased goods from a dealer in Providence, to the amount of \$6,000, upon credit, and assigned them without consideration, by a clear bill of sale, and the assignee removed them to Providence, where they would be free from attachment, and sold them there, saying that he intended, with the proceeds of sale, to pay the creditors of the merchant in New York, whose claim he had guaranteed, but refusing to give a list of the creditors, and the merchant also refused to show his books or make any exhibit of his affairs; held, the merchant and his assignee were not liable in an action of conspiracy,

¹ *Adams v. Paige*, 7 Pick. 542.

² *Adler v. Fenton*, 24 How. 407.

³ *Hall v. Eaton*, 25 Verm. 458.

if the goods were taken to Providence with a *bond fide* intent to sell them for the benefit of creditors ; but, if their intent was to secrete them, or to compel the Providence creditors to a compromise upon their own terms without making an exhibit of the affairs of the debtor, they were guilty of a conspiracy.¹

§ 18 *b*. Where two or more have entered into a conspiracy to defraud the plaintiff, any act done by either, in furtherance of the common object, and in accordance with the general plan, becomes the act of all, and each conspirator is responsible for such act. Thus where one has combined and conspired with others to cheat and defraud the plaintiff in the sale of certain property, by fraudulent concealments and misrepresentations, and the fraud has been perpetrated accordingly by some other member or members of the conspiracy ; he will be liable, although he may not individually have made any fraudulent misrepresentations, or have fraudulently concealed anything in regard to the conditions or qualities of the property.²

§ 19. The general principle applies in case of alleged conspiracy, as of other joint wrongs, that there must be proof of participation in *the same wrongful acts*. This of course involves, primarily, proof of the conspiracy itself. Thus, in an action on the case, against A and B, it was alleged that A was indebted to the plaintiff ; that the two confederated and conspired together, to prevent the plaintiff from obtaining security for, or payment of his debt ; that, in pursuance of such purpose and intention, and in order to enable A to take the poor debtor's oath, the defendants caused his property to be removed from his own custody and possession into the possession of B, by whom the same or the proceeds thereof were kept secreted from attachment ; that the plaintiff sued out a writ against A to recover the debt, and caused his body to be arrested ; that he took the poor debtor's oath and was discharged from arrest ; and that the plaintiff entered the suit and recovered a judgment, which remained wholly unpaid. The plaintiff gave evidence of everything alleged, except the conspiracy, of which there was no direct proof. Held, the action could not be maintained.³ So, in an action charging a conspiracy to obtain a favorable compromise of suits about to be commenced, it is not sufficient merely to show that there were no grounds to warrant

¹ Whitman v. Spencer, 2 R. I. 124.

² Wellington v. Small, 3 Cush. 145.

³ Page v. Parker, 43 N. H. 363.

the suits. It ought, in addition, to be proved, that the intention of the parties was unfairly directed to the attainment of such an end by understanding and agreement between them, shown either by their words or acts.¹ Upon the same principle, proof that a magistrate, a prosecutor, and a constable, each behaved improperly, will not support a charge of conspiracy in instituting and conducting a malicious prosecution.² So where the plaintiff charged a conspiracy to cheat and defraud him, whereby the defendants fraudulently obtained from him a conveyance of a certain tract of land to one of them; and prayed that the conveyance might be cancelled and the title to the land be adjudged to him; it was held, that a mere participation in the fraud, practised by the defendant to whom the conveyance was made, was not, of itself, sufficient to render the other defendants liable to be joined in the action, and that the petition showed no cause of action as to them.³ But an action for deceit in a sale may be maintained against two persons jointly, if they both knowingly make false representations at the time of the sale, though they had not previously conspired or agreed to make such representations, and though only one of them was interested in the expected fruits of the fraud.⁴

§ 19 *a*. With regard to the *pleading* and *evidence* in the action for conspiracy; in an action on the case for a conspiracy to defame, by spreading false statements that the plaintiff had cheated and defrauded a third person (the words not being actionable), and also by composing a libellous written statement to the same effect; the declaration need not aver special damage.⁵ Nor, in a count for a conspiracy to defame, by reporting and charging the plaintiff to have been guilty of a crime, is it necessary to aver that the reports and charges were made falsely and maliciously, nor to set forth the words spoken.⁶

§ 19 *b*. To prove a conspiracy to commit a particular fraud, a like fraud, committed by the alleged conspirators about the same time on a third party, is held admissible in evidence.⁷ So where a conspiracy to defraud the creditors of an obligor, between the obligor and a third person, the obligee, is alleged, the whole transaction may properly be left to the jury, to connect the obligee with

¹ *Leavitt v. Gushee*, 5 Cal. 152.

² *Newall v. Jenkins*, 26 Penn. 159.

³ *Johnson v. Davis*, 7 Tex. 173.

⁴ *Stiles v. White*, 11 Met. 356.

⁵ *Hood v. Palm*, 8 Barr. 237.

⁶ *Haldeman v. Martin*, 10 Barr. 369.

⁷ *Luckey v. Roberts*, 25 Conn. 486.

See *Preston v. Bowers*, 13 Ohio St. 1.

the original scheme; and such evidence, in connection with the acts of the obligee, is sufficient to shift the burden of proof upon the latter. And when such a conspiracy has been proved, it may be shown that the obligee engaged in it subsequently, without proof of express declarations or flagrant acts of participation. If it appears that the obligee was to be a principal actor in the execution of the plot, and he performs the part assigned to him, by arriving at the house of the obligor, who was his brother, making a formal settlement with him, and receiving the bond, which is entered up just in season to take precedence of the other creditors who were then preparing to seize upon the property of the obligor; the facts are proper to be left to the jury, as circumstantial evidence of collusion.¹ But in a special action on the case for fraud, by a conspiracy between the defendant and a deputy sheriff, evidence that the defendant had applied to another deputy sheriff to commit the same fraud is held inadmissible.²

§ 20. Under some circumstances, the person injured has the right of *electing*, whether to proceed against one party in one form of action, or against several parties jointly liable in another form. (a) Thus an action on the case lies against three proprietors of a stage-coach, upon a declaration that the coach was under their care, and that through their negligence the coach ran against the plaintiff, and injured him; the evidence being, that one of the defendants was driving, and the jury having found that the accident was occasioned by his negligent driving; although, it seems, the plaintiff might have maintained trespass against the driver.³ But to an action on the case, in the form of tort, against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant may plead in abatement, that the goods were delivered to him and his partners jointly, and that his partners are not sued.⁴ And although, in case of a joint trespass, the plaintiff

¹ Bredin v. Bredin, 3 Barr, 81.

² Handley v. Call, 27 Maine, 35.

³ Moreton v. Hardern, 6 Dowl. & Ry. 275; 4 B. & C. 223.

⁴ Powell v. Layton, 2 New Rep. 365. See chap. 1, § 22.

(a) A similar right of election sometimes applies as to who shall be the plaintiff in the suit. Thus, where goods have been levied upon and left in the possession of

the owner, he may maintain trespass for their removal, as well as the sheriff, and a recovery by one will oust the other. *Browning v. Skillman*, 4 Zab. 351.

may sue the trespassers jointly or separately; and a judgment against one without satisfaction is no bar to an action against another: yet the plaintiff can have but one satisfaction, except for costs, and, if he sues separately, must elect between the verdicts. He may elect from the more solvent or the larger judgment.¹

§ 21. It is stated in a work of authority,² that, where separate actions have been brought against several defendants for the same single act of trespass, the party last sued may plead the pendency of the first in abatement. And a recovery, against one of several parties to a joint tort, frequently precludes the plaintiff from proceeding against any other party not included in such action. Thus, in an action against one for a battery, or for taking away the plaintiff's posts, or destroying grass in a field, where several persons are concerned, the recovery against one will be a bar to an action against the others. And in these cases the Court will, in general, on a summary application, stay the proceedings in the second action, where it is manifest that the entire damages have been recovered in the first. (a) So, it seems, a judgment in trespass *de bonis asportatis*, not satisfied, is a bar to an action against a co-trespasser.³ And it is a good defence by way of satisfaction, to an action against several persons, that a former action was brought against them and another, a sum of money accepted from him, and the suit dropped.⁴ But a judgment in trover, without satisfaction against one trespasser, is no bar to an action against

¹ Page v. Freeman, 19 Mis. 421; Knott v. Cunningham, 2 Sneed, 204.

² 1 Chit. Pl. 79; acc. Smith v. Singleton, 2 M'Mul. 184.

³ Campbell v. Phelps, 1 Pick. 62.

⁴ Dufresne v. Hutchinson, 3 Taun. 117.

(a) On the other hand, a party, against whom a judgment has been rendered on a verdict, cannot, while the judgment remains in force, maintain an action against the other party jointly with others, alleging that said verdict was unjust and false, and was procured by them by fraud and perjury, and by a conspiracy to effect that purpose. He is estopped by the judgment. Dunlap v. Glidden, 31 Maine, 435.

A judgment in favor of several defendants in one action is a bar to an action in another form against one of those defendants alone. Thus the assignees of an insolvent debtor brought a bill in equity, to set aside conveyances of property made by the debtor to the defendants, as made and taken either without consideration and in fraud of creditors, or by way of unlawful

preference, contrary to the insolvent laws, charging the defendants, in the common form, with combining and confederating with divers other persons to the plaintiffs unknown, and praying for relief against the defendants jointly and severally; and the Court, after a hearing upon the merits, decreed that the demands, set up by the defendants in their several answers, were justly due them from the insolvent, and that the conveyances of property in payment thereof were not made in violation of the insolvent laws, and dismissed the bill. Held, that this decree was a bar to an action of trover by the assignees, for the same property, against one of the defendants in the suit in equity. Bigelow v. Winsor, 1 Gray, 299.

another person, for a distinct trespass upon the same property, committed at a different period, and not jointly, although a writ of execution may have issued upon the judgment.¹

§ 22. With regard to the respective liabilities of defendants in the same action, it has been considered a doubtful point, whether, if the plaintiff, in an action commenced against several tort-feasors, accept a sum of money from one of them, he can afterwards sue another for the same wrong.² And if one of several defendants in an action of trespass is arrested on a *ca. sa.*, and discharged by the plaintiff or by his consent, it is held that the Court will discharge the others from custody, and order satisfaction to be entered of record, upon their stipulating to bring no action on account of their arrest and imprisonment.³ (a) And where several defendants sever in their pleadings, and separate verdicts are found against them, if the plaintiff remits damages as to some of the defendants, judgment cannot be entered up against them, for damages found against a co-defendant.⁴

§ 23. Inasmuch as the liability of several persons for the same tort is originally separate as well as joint, it does not lose this character by the mere commencement of a joint action against them; but such action may proceed to different results with regard to the different defendants. Thus, where there is no evidence against one, he is entitled to judgment.⁵ So in trover against two for a joint conversion, the plaintiffs obtained judgment by default against one, and then withdrew their action against the other, upon receiv-

¹ Hopkins v. Hersey, 7 Shep. 449.

² Warden v. Bailey, 4 Taun. 67, 88.

³ Allen v. Craig, 2 Green, 102.

⁴ Golding v. Hall, 9 Port. 169.

⁵ Hamilton v. McGee, 19 Md. 43.

(a) In a late case, the following somewhat nice distinctions are made.

The discharge of one trespasser is that of all.

In case of separate judgments against joint trespassers, there can be but one satisfaction of the damages, but the costs can be collected on all the judgments.

If, pending separate suits, one is settled, and the defendant discharged, although it was the mutual intent that the settlement should not affect the other suits, yet such suits are thereby discharged, and no recovery can be had in them of nominal damages or costs. Ayer v. Ashmead, 31 Conn. 447. (In this case, Butler, J., delivered an elaborate and learned dissenting opinion upon the last point.)

It has been held, that, where a joint

judgment is fully paid by one defendant, it cannot be kept alive for his benefit against another. Thus one or two judgment debtors paid the amount of the judgment, but, instead of the execution being returned satisfied, it was, with the consent of the creditors, returned unsatisfied, and an alias execution taken out, upon which the other judgment debtor was committed, with the view to compel him to contribute his share of the debt for the relief of him who had made the payment. Upon *audita querela*, it was held, that the alias issued improvidently, and that the imprisonment under it was unlawful. Brackett v. Winslow, 17 Mass. 153. As to the effect of a release by one tenant in common, see Gock v. Keneda, 29 Barb. 120.

ing from him partial satisfaction for the wrong, and agreeing no further to prosecute him personally therefor. Held, that damages might be assessed against the defaulted defendant for the value of the goods converted, with interest from the time of conversion, deducting therefrom the amount received from his co-defendant, by way of compromise, for *his* liability.¹ And in an action of trover against several defendants, the refusal of the presiding Judge to instruct the jury, that they are authorized (if they so find) to return a verdict against some of them, and in favor of the others, was erroneous.² But exceptions, for that cause, will not be sustained, where the jury found specially that there was no conversion by the defendants, or either of them; for, in such case, the instruction, had it been given, could have been of no benefit to the plaintiff.³ So W, having been made an agent to settle a claim which the plaintiff had against divers persons, for a joint assault, settled with two of them, and gave each of them a writing indemnifying them against any claim the plaintiff might have against them, growing out of such assault. Held, that this was a full discharge as against the plaintiff in favor of these two.⁴ Held, also, that, if it did not appear that this was not a settlement for all the damages sustained by the plaintiff, it would operate as a discharge of all the other persons engaged in the assault.⁵ So, in trespass *qu. claus.*, it is competent for the jury to acquit one defendant and find the other guilty, and assess damages against him.⁶ (a) So, in an action

¹ *Heyer v. Carr*, 6 R. I. 45.

² *Powers v. Sawyer*, 46 Maine, 160.

³ *Ibid.*

⁴ *Eastman v. Grant*, 34 Verm. 387.

⁵ *Ibid.*

⁶ *Blackburn v. Baker*, 7 Port. 284.

(a) But it is held error for the Judge, after the issue is made up, and a jury sworn, to order the jury, at the instance of the plaintiff, to find a verdict of acquittal as to one of the defendants. *Gearhart v. Smallwood*, 5 Mis. 452.

Where there is no evidence whatever, tending to show a liability on the part of one of two defendants, the court should, on motion, direct the jury to find a separate verdict in his favor. Though such motion should, according to the practice of the court, be made at the close of the plaintiff's case; it is a matter within the discretion of the judge, depending on the probabilities of the case; and where a motion is then made and not overruled as premature, the defendants ought not to be prejudiced, by failing to make a second motion after all

the evidence is in. *Brown v. Lewis*, 25 Mis. 335; *Benoist v. Sylvester*, 26 Mis. 585.

The court cannot direct the acquittal of one, unless a nonsuit would have been proper on the evidence, or the verdict against him would have been set aside as against evidence. *Montfort v. Hughes*, 3 E. D. Smith, 591.

An action of ejectment was brought against five defendants, who entered into the consent rule jointly, and pleaded jointly. They severally possessed the premises in separate parts; and, the jury having found each defendant separately guilty as to the part in his possession, and not guilty as to the residue, judgment was rendered accordingly. *Jackson v. Woods*, 5 Johns. 278.

in tort against six, the plaintiff may recover a verdict against two.¹ And the same rule prevails, although the tort also involves a breach of contract, if the action is substantially in tort. Thus, in an action on the case in the King's Bench, against ten defendants, the plaintiff declared, that, before and at the time of the grievances complained of, they were proprietors of a stage-coach for the conveyance of passengers for hire from A to B, and they received the plaintiff as an outside passenger, to be safely conveyed thereon from A to B for hire; and by reason thereof they ought to have safely conveyed him accordingly; and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskilfulness, and default of themselves and their servants, the coach was upset; by means whereof the plaintiff was hurt, and sustained other injuries. A jury having found a verdict against eight of the defendants only, and in favor of the other two, and judgment being entered accordingly; held, that, as the action was founded on a breach of duty imposed by the custom of the realm, which was a breach of the law, and as the declaration was framed on a misfeasance, such verdict and judgment were not erroneous, and they were therefore affirmed in the Exchequer Chamber in error.² But, where several defendants in trespass plead one plea, and a joint verdict and damages are found against all, judgment must be rendered jointly against all. And if the verdict be set aside as to part, no judgment can be rendered against the others.³ Though, where part are acquitted and part found guilty, setting aside the verdict as to the latter does not affect its validity as to the former.⁴

§ 24. In trespass against several, a general verdict for the plaintiff is equivalent to finding all the defendants guilty.⁵ And in an action of trespass against four, where the case is submitted to the jury as to all the defendants, a verdict of guilty against three, assessing the damages, is good, though it does not find the fourth not guilty.⁶ So a declaration alleged that both of two defendants committed the assault. Each separately pleaded *non cul.*, and that the plaintiff committed the first assault upon one of the defendants, who was the father of the other, upon all which pleas issue was joined. The verdict was, that "as to first issue, the

¹ Cooper v. South, 4 Taunt. 802.

² Bretherton v. Wood, 6 Moo. 141.

³ Cunningham v. Dyer, 2 Monr. 50.

⁴ Brown v. Burrus, 8 Mis. 26.

⁵ Sutliff v. Gilbert, 8 Ham. 405; Cane v. Watson, 1 Morris, 52.

⁶ Wilderman v. Sandusky, 15 Ill. 59.

defendants are guilty of the premises within charged upon him, in manner and form as the plaintiff hath within alleged," and, "as to the other issue, that the defendants, of their own wrong, and without any such cause as they within by pleading have alleged, assaulted the plaintiff, in manner and form as he hath within alleged." Held, a substantial finding by the jury on the matter in issue, and sufficient to support a final judgment in favor of the plaintiff.¹ So, where there are several pleas in replevin against two, and a verdict on one for one of the defendants, and a judgment for a return of the property in favor of both; this judgment, though informal, cannot be taken advantage of by the plaintiff.² But it is held, that, in a joint action of trespass against several defendants, there cannot be a nonsuit as to one, and a verdict against others.³

§ 25. The principle of *severance*, however, is held not to apply to the award of damages, (a) although all the defendants may not be equally culpable.⁴ But it is held, that, when a joint trespass is proved, the jury are to estimate the damages according to the amount in their opinion *the most culpable* ought to pay.⁵ So in trover against two, one of whom is defaulted, and the other found guilty by the jury, there is but one assessment of damages, and a joint judgment.⁶ The plaintiff is entitled to a joint verdict; and, if the damages are severed and apportioned, he may set aside the verdict and have a *venire de novo*, or enter a *nol. pros.* against all but the one whom he elects to charge, and have judgment entered against him.⁷ And the law does not require the Court to allow separate trials, or to direct a separate assessment of damages.⁸ The former is matter of discretion with the Court.⁹

§ 25 a. But the contrary doctrine had been held, that, in trespass for assault and battery against several defendants, who pleaded

¹ Mitchell v. Smith, 4 Md. 403.

² Gotloff v. Henry, 14 Ill. 384.

³ Revett v. Browne, 2 Moo. & P. 12.
But see 19 Md. 43.

⁴ Eliot v. Allen, 1 Com. B. 18.

⁵ Clark v. Bales, 15 Ark. 452.

⁶ Gerrish v. Cummings, 4 Cash. 391.

⁷ Layman v. Hendrix, 1 Ala. 212.

⁸ Allen v. Craig, 1 Green, 294; Johnson v. Hannahan, 3 Strobb. 425.

⁹ Sawyer v. Merrill, 10 Pick. 16; Clement v. Wafer, 12 La. Ann. 599.

(a) If *separate* suits be brought against several defendants for a joint trespass, the plaintiff may recover separately against each, but he can have only one satisfaction; and he may elect *de melioribus damnis*, and issue his execution against one of

the defendants; and the others must pay the costs of the suits against them respectively. Livingston v. Bishop, 1 Johns. 290. See Gregory v. Cotterell, 18 Eng. L. & Eq. 99; 35 Barb. 303.

jointly not guilty, a verdict might be found for several damages.¹ And in trespass *qu. claus.* against several, where the evidence was of three distinct trespasses, each of which was committed jointly by some of the defendants only (all of them being on the close at the same time), and part of them were defaulted, and part pleaded not guilty; it was held that the damages for each trespass were rightly assessed jointly against those who jointly committed it; and the damages for the several trespasses were rightly assessed severally. In such case, the costs are to be taxed, and execution issued therefor jointly, against all the defendants, and several executions for damages.² So, when two are sued jointly for trespass upon land, and the declaration alleges join trespasses on certain days, there may be a verdict against both jointly, and a joint assessment of damages for trespasses in which they united; but there cannot be a verdict against both jointly, and a separate assessment of damages against each, for any trespasses committed by them separately at different times.³ So although, in an action of trespass against several, who plead jointly, if the jury find them guilty jointly, they should assess the damages jointly against all, and should assess against all who are found guilty the amount which they think the most guilty ought to pay; and it is error for the Court to instruct the jury to sever the damages, and assess respectively what in their opinion each party found guilty ought to pay: yet the error has been held not to be one of which a defendant may complain, it not being to the disadvantage of any defendant. And, if the jury, by mistake, assess several damages, the plaintiff may enter a *nol. pros.* as to some, and take judgment against one.⁴ So where the Court refused to allow separate trials in an action against two defendants for a joint trespass, but instructed the jury that they might make a distinction in the assessment of damages, and the jury made no such distinction; it was held that the refusal of the Court was proper.⁵ So, in an action of trespass against three defendants, the jury assessed \$7.83 damages against each, stating the aggregate amount at \$23.49. The Court informed the jury, that the law required joint damages, and directed a verdict to be drawn up in proper form for the sum

¹ *Bevin v. Linguard*, 1 Brev. 503; *Chapman v. House*, 2 Str. 1140; *Henry v. Sennett*, 3 B. Mon. 311.

² *Proprietors, &c. v. Boulton*, 4 Mass. 419; *Kempton v. Cook*, 4 Pick. 305.

³ *Rosworth v. Sturtevant*, 2 Cush. 392.

⁴ *Crawford v. Morris*, 5 Gratt. 90.

⁵ *Johnson v. Hannahan*, 3 Strobb. 425.

of \$23.49 against the three defendants. Held, the verdict was legal and proper.¹ (a) So where the jury, in an action of trespass against two joint trespassers, returned the following verdict: "We, the jury, find A \$150, and B \$100, and all the costs to be paid by A and B, and \$50 damage to be paid by A;" it was held, that the legal effect of the verdict was, that the jury intended to find \$200 damages against A, the principal trespasser, and that a joint judgment should be entered against both defendants for that amount, and a *remititur* entered as to the \$100 found against B.²

§ 26. Although, in trespass against several defendants, who jointly plead not guilty, one of them, against whom there is no evidence, may be acquitted, and a verdict taken against the others; it is otherwise as to a joint plea of justification, under which, if it be not supported as to all the defendants, none of them can be protected.³

§ 27. In trespass against several defendants, where one was not served with process, and, on trial before a justice of the peace,

¹ Fuller v. Chamberlain, 11 Met. 503.

² Simpson v. Perry, 9 Geo. 508.

³ Drake v. Barrymore, 14 Johns. 166;

Gleason v. Edmunds, 3 Scam. 448. See Settle v. Alison, 8 Geo. 201.

(a) The case of Buddington v. Shearer, 20 Pick. 477, was an action of trespass, founded upon a statute, which provides that "every owner or keeper of any dog shall forfeit, to any person injured by such dog, double the amount of damage sustained by him." It was proved that the mischief was done by a dog belonging to one Mowry, together with another dog alleged to belong to the defendants. The jury were instructed, that the owner of each dog was liable for all the damage done by both, while they were together; but, on exceptions, this instruction was held erroneous. Wilde, J., says: "The law was laid down differently in the action of Russell v. Tomlinson et al., 2 Conn. R. 206, an action founded on a similar statute of the State of Connecticut; and we are of opinion that that case was rightly decided, for the reasons there stated. The action was brought against two owners of dogs who owned the dogs severally. And the Court held that a joint action could not be maintained against them, although the mischief were done by the dogs jointly; but that each owner was liable only for the mischief done by his own dog. There may be some difficulty in ascertaining the quantum of damage done by the dog of each,

but the difficulty cannot be great. If it could be proved what damage was done by one dog, and what by the other, there would be no difficulty; and on failure of such proof, each owner might be liable for an equal share of the damage, if it should appear that the dogs were of equal power to do mischief, and there were no circumstances to render it probable that greater damage was done by one dog than by the other. But whatever the difficulty may be, it can be no reason why one man should be liable for the mischief done by the dog of another." Acc. Denny v. Correll, 9 Ind. 72.

Where a statute provides that every owner of a dog shall cause it to be registered, &c., and afterwards that whoever keeps a dog not thus registered, &c., shall forfeit a certain penalty; a keeper, who is not the owner, is liable therefor. Jones v. Com. Mass. S. J. C. 1860.

The somewhat fanciful and amusing application of the maxim *de melioribus damnis* has been recently made; that, where two dogs, of different sizes, kill sheep in the dark, the jury have a right to determine, in the absence of direct proof, that the larger dog killed the greater number of sheep. Wilbur v. Hubbard, 35 Barb. 303.

judgment was rendered against those who had been summoned, and, upon an appeal taken by them, judgment was rendered not only against them, but also against the defendant not summoned; it was held, that as to him the judgment was a nullity.¹ But in trespass against A, B, and C, A and B were taken, and C returned *not found*. The plaintiff declared against A and B, *simul cum*. C pleaded *not guilty*, and the jury found a general verdict of guilty. A and B moved in arrest of judgment, on the ground that the plaintiff could not proceed, until all the defendants were brought into court. Held, the plaintiff might, at his election, proceed against one or more of the defendants; and the declaration, though informal, was good after verdict.² So where one of three defendants in trespass before a justice of the peace appealed, and the plaintiff filed a declaration against him alone, and the defendant demurred to the declaration on that ground, and because it set out an offence different from that described in the warrant; the demurrer was overruled.³ And where, in an action of assault and battery against two defendants, one only is taken, and the plaintiff declares as against joint debtors, stating one to be taken and the other not found; the declaration, though perhaps the subject of special demurrer, will not be set aside as irregular.⁴ So where the plaintiff declared against A and B for a joint trespass, and A suffered judgment to be rendered against him by default, and judgment was rendered against B upon trial, and damages were assessed against A at the same amount with the judgment against B, and the case was passed to the Supreme Court upon exceptions taken by B; held, not erroneous.⁵

§ 28. In trespass against three, judgment was rendered against all the defendants; on review, the plaintiff obtained a verdict against two only, and for increased damages; and the third was allowed to tax the costs of travel and attendance for himself and all the witnesses used in the defence, both on the first trial and on the review.⁶

§ 29. In trespass for an assault and battery against two defendants, a verdict was rendered against both, and joint damages less than *four pounds* assessed. The plaintiff reviewed the action, and upon the second trial a verdict was found for one of the

¹ *Prichard v. Campbell*, 5 Ind. 494.

² *Rose v. Oliver*, 2 Johns. 365.

³ *Blossingame v. Graves*, 6 B. Mon. 88.

⁴ *Jarvis v. Blennerhasset*, 18 Wend. 627.

⁵ *May v. Bliss*, 22 Verm. 477.

⁶ *Durgin v. Leighton*, 10 Mass. 56.

defendants and against the other, and damages assessed against the latter above £4. The first defendant recovered his costs, and the plaintiff recovered costs against the second; but whether costs of both trials or of the review only, was held doubtful.¹

§ 30. Where A recovers a judgment against B and C for an assault and battery, B being insolvent and C much embarrassed; A may have his judgment applied in satisfaction or set-off, against a judgment which B had recovered against A for an assault and battery, and A may sustain a bill in chancery for that purpose.² (a)

¹ Galloway v. Pitman, 3 Mass. 408.

² Simson v. Hart, 14 Johns. 63.

(a) The most frequent case of joint rights and liabilities grows out of the relation of *partnership*. Partnership, however, is itself a *contract*, and the law relating to it falls almost exclusively under the head of contracts, either as between the partners themselves, or in reference to their joint or several relations to third persons. A few miscellaneous points may be stated, pertaining to torts or wrongs.

Where persons enter into a copartnership, with a fraudulent purpose of hindering or delaying the creditors of one of the parties in the collection of their debts, it is held that such persons cannot maintain an action of trespass *qu. claus.* jointly against a person who forcibly enters the storehouse and seizes the goods. *McPherson v. Pemberton*, 1 Jones, 378.

An action lies against one, who fraudulently induced the plaintiff to enter into a general copartnership, with one who was the insolvent debtor of the defendant; and afterwards induced the copartners to assume all the debts due him from the insolvent, and then seized the plaintiff's property, in satisfaction of the debts. *Bean v. Bean*, 12 Mass. 20.

If after the dissolution of a partnership, having outstanding debts, an insolvent partner sells a part of the partnership property, for the purpose of raising money to pay his individual debts, and the purchaser, at the time of the purchase, has full knowledge of the insolvency of such partner, and of his object in making the sale; the sale is fraudulent and void. *Geortner v. The Trustees*, &c. 2 Barb. 625.

In general, one partner may be held responsible for the wrongful act of another, if connected with the partnership business.

The managing partner of a mining copartnership refused to deliver up ore belonging to the former tenants of the mine, on the ground that it was partnership property, and there was subsequently a notice by the

attorney for the defendants, offering to deliver up tools that were in the same building with the ore, but the notice was silent as to the ore. Held, evidence of conversion by all the partners. *Lloyd v. Bellis*, 37 Eng. L. & Eq. 545.

So, to support trover for notes against a partnership, it is only necessary to show that the conversion complained of was a partnership transaction. *St. John v. O'Connell*, 7 Port. 466.

And, in trover, the allegation that the defendants were partners is immaterial, and need not be proved. *Head v. Goodwin*, 37 Maine, 181.

But there is no legal presumption, that one partner concurs in the wrongful acts of another; and he is not liable therefor, unless they were done within the proper scope and business of the partnership, or were authorized or adopted by him. *Taylor v. Jones*, 42 N. H. 25.

Where property, debts, and demands are transferred and assigned by partners to their creditor as security for his debt and against an indorsement, the title vests in the creditor, with the right of possession and absolute dominion, subject only to the right to redeem. And if the creditor intrusts such property with the partners, to sell and collect the same, as his agents and factors, and pay over the proceeds to him, they do not become liable, upon a sale of the property by them, as tort-feasors, as upon an unauthorized disposal thereof, so as to authorize an action of trover against any of them alone. Their liability rests upon contract, and not on tort, and is necessarily joint and not several. *Harris v. Schultz*, 40 Barb. 315. Hence an action for refusal to account for and pay over the proceeds must be brought against both. And if brought against one only, the objection of non-joinder is, in New York, properly taken by demurrer. *Id.*

Questions also arise, in reference to the

liability of the undivided interest of a partner to be taken for his debts.

If an officer attach and take possession of personal property of a firm on a writ against one partner, who has no equitable interest in such property, he is a trespasser. *Cropper v. Coburn*, 2 Curt. 465.

A sheriff attached partnership property on a writ against the partnership, and afterwards, while the property was in his possession under that attachment, returned an attachment of the same property on a writ against one of the partners. Held, that, so long as the former attachment subsisted, he was not liable, in an action of trover, in favor of one who claimed under a sale from the partnership, but was unable to hold against the partnership creditors; notwithstanding the partnership debt was afterwards satisfied, by the sale of other property attached at the same time. *Page v. Carpenter*, 10 N. H. 77.

The defendant, an officer of the Palace Court, seized under a *fi. fa.* against A, partnership effects of A and B, and sold them to various purchasers, who carried them away. In trover by the assignees of B (who had become bankrupt), held, the seizure and sale did not amount to a conversion; but in the absence of any evidence, to show in what proportions the partners were interested, the assignees were entitled to a moiety of the proceeds. *Mayhew v. Herrick*, 7 Com. B. 229.

One partner may either lose his claim and right of action against a third person, or become liable for the wrong of another partner, by subsequent ratification or adoption.

The stock and tools of trade of a partnership were attached at the suit of a creditor, and the officer delivered the same to the creditor, taking his accountable receipt therefor; and afterwards it was agreed between the creditor and one of the partners, that the creditor should take the property at an appraised value and appropriate it to the debts of the partnership; and they gave notice of this arrangement to the officer, and discharged him from his liability on account of the attachment. The other

partner having brought trover against the officer, the proceedings were explained to him, and he said he was convinced that the partnership was insolvent, that the property had gone to pay its debts, and that the creditor had made an advantageous disposition of it; but he nevertheless continued to prosecute his action against the officer, saying that, as the affair had begun in the law, it might end in the law. Held, the question whether the plaintiff had approved and ratified the doings with a full knowledge of all the facts, was for the jury; and if he had, the defendant was entitled to a verdict. *Hewes v. Parkman*, 20 Pick. 90.

Where one of two partners obtains goods by fraudulent representation as to the solvency and credit of the firm, and afterwards the firm sells the goods, replevin in the *cepi* lies against both. *Olmsted v. Hotelling*, 1 Hill, 317.

Where goods are obtained for the use of a firm by the fraud of one of its members, the other partner, by receiving and participating in the use of the goods, will be held to have adopted the fraudulent act, and will be placed in the same situation, with reference to the rights of the vendors, as if he had directed his partner to procure the property, or had concurred with him in the transaction. So one is liable, either in *assumpsit* or *case*, for the consequences of frauds practised by another in the transaction of the partnership business; although he was entirely ignorant of such frauds, and derived no benefit therefrom. So, where one partner, on being notified of a fraud committed by another, and that the firm will be held liable therefor, omits to repudiate or disaffirm what has been done by his copartner, he will be held to have adopted and ratified the fraud, and will from thenceforth be regarded as a joint wrong-doer. *Hawkins v. Appleby*, 2 Sandf. 421.

Where two partners wrongfully take property, and one afterwards settles with the owner for one-half thereof, the owner may bring trover against the other for the remaining half. *McCrillis v. Hawes*, 33 Maine, 566.

CHAPTER XXXIV.

CORPORATIONS.

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| 1. General liability of corporations for tort. | 4. Fraud, liability for agents, &c. |
| 3. For what torts and in what actions corporations are liable. | 7. Refusal of subscription to new stock. |
| | 8. Expulsion of members. |

§ 1. IN immediate connection with *joint* rights and liabilities, may be considered the subject of torts or wrongs committed by or against *corporations*. A corporation being for the most part a creature of statute, the statute-law of each State, and the charter of each corporation, are of course to be referred to, in settling the powers and duties of particular corporations or classes of corporations. It is, however, inconsistent with the plan of the present work, to do more than state the general rules of law upon the subject, independent of express legislation.

§ 2. It has been sometimes suggested, that a corporation is not liable, as such, for a tort.¹ But the better opinion is, that such liability has been always recognized by the English law ;² and this may now be considered a well-settled doctrine. Thus an action lies against a turnpike company, for the value of a horse killed by the fall of a bridge on the road.³ Or against a canal company, for damage caused by the want of repair of its locks.⁴ So for not repairing a creek, which the corporation was bound to keep in repair.⁵ Or against a turnpike company, for stopping a water-course, and thus overflowing the plaintiff's tanyard.⁶ Or an omnibus company, for so driving their coaches as to interfere with the plaintiff's use of the road.⁷ So against a corporation having the return of writs, for a false return.⁸ So where, by contract made through its president or agent, a *cotton-pressing* corporation agreed

¹ 1 Kyd. 225. See *Tompkins v. The Floyd*, &c. 19 Ind. 197 ; 23 Ill. 332.

² *Chestnut, &c. v. Rutter*, 4 S. & R. 6 ; *Yarborough v. Bank*, &c. 16 E. 6.

³ *Townsend v. Susquehannah*, &c. 6 Johns. 90.

⁴ *Riddle v. Proprietors*, &c. 7 Mass. 169.

⁵ *Mayor, &c. v. Turner*, Cowp. 86.

⁶ 4 S. & R. 6.

⁷ *Green v. London*, &c. 29 Law J. C. P. 13.

⁸ *Argent v. St. Paul's*, &c. cited in 3 T. R. 16.

to unload a boat, and the corporation's slaves took possession of the cotton for that purpose, and carelessly sunk it; the corporation was held liable.¹ So where the wall of a church, negligently permitted to stand after the rest of the building has been burned, falls upon a person passing along the street; the corporation are liable.²

§ 3. With regard to the *nature* of the wrongs for which a corporation, as such, may be held responsible; it has been said that an action for *malicious prosecution, slander, false imprisonment, or assault and battery*, cannot be maintained against a corporation aggregate, but must be brought against the individuals doing the deed.³ But, on the other hand, it is held, that an action on the case, for a vexatious suit, may be sustained against a corporation aggregate.⁴ And more particularly with regard to the *form* of remedy against a corporation for a tort or wrong; it was formerly supposed, that the action of *trespass* would not lie against a corporation, upon the technical ground that it cannot be subject to a *capias*, which is the proper process in that action.⁵ But it is shown by Mr. Angell — on Corp. 389 — that municipal corporations have been held thus liable from very ancient times. Thus trespass was maintained against a *mayor and commonalty* for distraining beasts which were exempted from toll.⁶ So also for disturbing the plaintiff in taking deodands and other profits in a river.⁷ And it is now well settled, that trover or *trespass* will lie against a corporation aggregate or a municipal corporation for the acts of its officers or agents done in the performance of their ordinary duties, within the scope of their authority, or by special directions of the corporation.⁸ (a) So a corporation may be sued for an assault and battery committed by their servant, acting under their authority.⁹

§ 3 a. And in this connection it may be added, as a rule per-

¹ *Marlatt v. Levee*, &c. 10 Louis. 583.

² *Rector, &c. v. Buckhart*, 3 Hill, 193.

³ *Childs v. Bank, &c.* 17 Mis. 213.

⁴ *Goodspeed v. The East Haddam, &c.* 22 Conn. 530.

⁵ 1 Kyd, 223.

⁶ 9 Hen. VI. 1; *Smith, v. Birmingham, &c.* 1 Ad. & El. 526.

⁷ 45 Edw. III. 23.

⁸ *Watson v. Bennett*, 12 Barb. 196; *Allen v. Decatur*, 23 Ill. 332; *The President, &c. v. Wright*, 5 Ind. 252; *Dater v. The Troy, &c.* 2 Hill, 629; *Maund v. Mon. Canal, &c.* 4 Man. & G. 452; *Eastern, &c. v. Broom*, 2 Eng. L. & Eq. 406; *Edwards v. Union Bank, 1 Branch*, 136.

⁹ *Moore v. Fitchburg*, 4 Gray, 465.

(a) It has been sometimes held that *case* is the proper action against a corporation, which causes a commission of a trespass by its agent. *Hamilton, &c. v. Turnpike, &c. Wright*, 603.

But, on the other hand, *case* cannot be

maintained against a corporation for injuries *wilfully and intentionally* committed by its servants, and not produced in the course of their regular employment as servants. *Illinois, &c. v. Downey*, 18 Ill. 259.

fectly established, and applicable alike to all wrongs and forms of action, that corporations are liable for injury caused by the wrongful acts and neglects of their *servants and agents*, done in the course and within the scope of their employment.¹ Or where, under like circumstances, an individual would be liable.² Subject, however, to the following limitations. To render a corporation liable for the wrongful acts of its officers, it must either appear that they were expressly authorized to do the act, or that it was *bond fide* done, in pursuance of a general authority in relation to the subject of it, or adopted or ratified by the corporation.³ Where an affirmative act is complained of, the only way in which a corporation can be liable, in an action on the case, is either by their organized action through the board of direction, or for the acts of their agents, on the principle of *respondeat superior*.⁴ And the obligation of a corporation, so far as respects those in their employment, does not extend beyond the use of ordinary care and diligence.⁵ It is said, "Where the directors of a company do acts in violation of their deed, in a matter in which they have no authority, such acts are altogether null and void. But when acts to be done are within the power and duty of the directors, and are neglected, and thereby third parties are damaged, neither a court of law nor of equity will allow the company to take advantage of that neglect."⁶ Upon these grounds, a corporation is not liable for a wilful trespass of a person employed by it, although the act be authorized and sanctioned by its president and general agent.⁷ And although an authority by a corporation to commit a tort need not be under seal; yet, in order to sustain an action of trespass for the act of its agent upon the ground of ratification, such ratification must be clearly proved. Thus, where the plaintiff had been taken into custody by a railway inspector, charged with having no ticket, refusing to pay the fare, intoxication, and assaulting the inspector; and, at the hearing before the magistrate, the solicitor of the company attended to conduct the proceedings: held, that such attendance was no evidence of ratification by the company, it not appearing that the facts were known to them.⁸

¹ Ang. on Corp. 302; King v. Paterson, &c. 5 Dutch. 504.

⁶ King v. Boston, &c. 9 Cush. 112.

² First Baptist, &c. v. Schenectady, &c. 5 Barb. 79; State v. Morris, &c. 3 Zab. 360.

⁷ Per Lord St. Leonards, Barge v. Shortridge, 31 Eng. L. & Eq. 44.

³ Per Shaw, C. J., Thayer v. Boston, 19 Pick. 516.

⁸ Vanderbilt v. Richmond, &c. 2 Comst. 479.

⁴ Sherman v. The Rochester, &c. 15 Barb. 574.

⁵ Eastern, &c. v. Broom, 2 Eng. L. & Eq. 406.

§ 4. With reference, more particularly, to the liability of corporations for *fraud*; if the directors of a joint-stock company, in the course of their dealings on behalf of the company with third parties, by fraud induce such parties to contract with them, and the company benefits by the transaction; the company will be bound by such fraud, even where the fraud consists in false reports submitted by the directors at their annual meetings to the company. Thus, in an action by the N. Joint Stock Company, bankers and brokers, for money lent to purchase shares in the company; the defendant pleaded, that the directors had in their annual reports falsely represented their affairs to be flourishing, whereas the company was insolvent; and paid large dividends, whereas such dividends were paid out of the capital; and that A, their manager, falsely representing the said shares to be of great value, induced him to purchase them, and at the same time, on the part of the company, offered to advance the money, and promised that the company would hold the shares for him until they could be sold at a profit, without his being called upon for the price; and he, relying on such representations, accepted the shares, which A accordingly bought and paid for, and still possessed. Held, on demurrer, a good answer.¹ So a demurrer to the answer, in a suit upon a stock subscription, which set up fraud, in that the company, since the defendant's cash subscription, had taken a large land subscription at enormous prices, is bad.²

§ 4 a. But where a corporation had different transfer books for different classes of its stock, and stockbrokers attached different values to the several classes, and a subscriber for stock, when he subscribed, was told by the officers of the corporation, that his stock would be transferable on a particular class of books, which was afterwards refused; it was held, that this was not a fraud which would avoid the contract, but that the remedy of the stockholder was by an action for damages.³ So fraudulent representations by an officer of a corporation at a public meeting, in presence of a majority of the directors, but not in pursuance of any authority from their board, will not discharge a subscriber to stock.⁴ And parol declarations made by officers of a company on public occa-

¹ National Exchange Co. v. Drew, 32 Eng. L. & Eq. 1.

² Maccoun v. Indiana, &c. 9 Ind. 262; Hornaday v. Lane, Ib. 263.

³ Lohman v. New York, &c. 2 Sandf. 39.

⁴ Buffalo, &c. v. Dudley, 4 Kern. 336.

sions, if admissible at all to invalidate a subscription for stock, cannot avail a subscriber, who does not show that such declarations amounted to fraud on the part of the company, inducing error on his own part when he subscribed.¹ So, in an action for calls against a shareholder of a joint stock company, a plea, that the defendant was induced to become a shareholder by the fraud of the plaintiffs, was held bad, for not averring that the defendant had repudiated the contract, and had done nothing under it to make him liable as a shareholder.² And a discharge from a stock subscription, on the ground of fraud, cannot be obtained by one who was himself a party to the fraud.³

§ 5. The president of a corporation is not *ex officio* an agent to sell the property, and his representations as to property to be sold, unless he be specifically authorized, are not binding on the company.⁴ And a fraudulent certificate of ownership of shares, over and above the limited capital stock of a corporation, by its agent intrusted with their transfer only, gives no recourse for damages against the corporation, to one taking it *bonâ fide* and without notice of fraud, from the original vendee with notice, in whose hands it was void. Nor does the unauthorized issue of false and fraudulent certificates of stock, by the agent of a corporation, estop the corporation to deny its liability for damages thereby sustained by innocent purchasers.⁵ Thus (in a recent and leading case) Schuyler, the president and transfer agent of the defendants, issued to A, without consideration, a certificate of ownership of eighty-five shares of the defendants' capital stock. The certificate was in all respects similar to the genuine certificates, which the agent was authorized by the by-laws to give, upon a transfer of stock made upon the books, and upon the surrender of the outstanding certificate. It was, however, fraudulent, and represented no genuine stock, and no existing certificate was surrendered previous to its issue, and this was known to A. The plaintiff received the certificate, with an assignment and power of attorney in blank, *bonâ fide*, as collateral security for a loan to A upon his note, which loan was received and appropriated by Schuyler. The

¹ Vicksburg, &c. v. McKean, 12 La. An. 638.

² Deposit, &c. v. Ayacough, 37 Eng. L. & Eq. 56.

³ Southern Plank, &c. v. Hixon, 5 Ind. 165.

⁴ Crump v. U. S. Mining Co. 7 Gratt. 352.

⁵ Mechanics' Bank v. New York, &c. 3 Kern. 599. See Mitchell v. Rome, &c.

17 Geo. 574.

capital was limited by law to \$3,000,000, all of which had been duly issued previous to this transaction ; and the par value of the shares was also fixed by law at \$100. After demand of payment of A, and his failure and insolvency, the plaintiff applied to the defendants to have the stock transferred, but they refused to allow it. The repayment of the market-value of the shares, at the time the certificate was issued, was then demanded and refused, and this suit was brought. In the court below, it was held, that the plaintiff might recover the market-value of eighty-five shares of the defendants' stock. But this decision was reversed by the Court of Appeals, who held, that the certificate was void in the hands of A, as it was issued fraudulently, and he paid nothing for it ; and Schuyler had no power to issue a certificate, except on the conditions precedent, of a transfer on the books of shares by some previous owner, and the surrender of that owner's certificate ; and this was known to A. Also, because it represented no stock, and neither the directors, by whom Schuyler was appointed, nor the corporation, had power to create the stock ; all the powers of the corporation in the creation and issue of stock being exhausted. Also, that the certificate was void under all possible circumstances ; and the plaintiff could acquire no rights by the assignment of it, which were not possessed by his assignor ; certificates of stock not being *negotiable instruments* in the sense of the commercial law, so that, by their indorsement and delivery to a person in good faith, a title to the stock they profess to represent may be acquired, although in the hands of the vendor they are spurious and void, and although the company has never recognized the transfer. Also, that an agent's apparent powers are those only which are conferred by the terms of his appointment ; and for acts done within an authority thus manifested the principal is liable, but not for an act, which, though clothed with the indicia of authority by the agent, is not within his apparent authority. Schuyler had no apparent authority for his act, and his principal could give him none, and was not therefore liable. Also, that the doctrine, that the mere employment of an agent in situations of trust is a certificate of his character, and, in case he deceives others, to their injury, his employer must make compensation, is no further true, than that he must be responsible where the agent is guilty of fraud and deceit in doing his master's business,

because the fraud enters into and is a part of the authorized transaction.¹

§ 6. Persons who exercise the corporate powers of a corporation may, in their character as trustees, be held liable in a court of chancery, for a fraudulent breach of trust; and a stockholder, where the directors collude with others who have made themselves liable by negligence or fraud, and refuse to prosecute, or where the directors are necessarily parties defendants, may file a bill in behalf of himself and the other stockholders; in which case, the corporation must be made a party defendant.²

§ 7. The claim of a stockholder to *subscribe for new stock* may sometimes give occasion for an action against the corporation. But, in an action by a stockholder, for refusing to permit him to subscribe for new stock authorized to be issued, and to which he was entitled to a pre-emption, it is a material averment, and must be proved, that he demanded and offered to subscribe.³ (a)

§ 8. A member of a corporation may claim damages of the company for *expelling* him without previous hearing.⁴ But where the rules required that a member should be summoned before expulsion, and the affidavit stated that the complainant had been expelled without any summons; it was held, that this was no ground for an application to justices, after an award made by arbitrators, who had heard and decided upon the objection.⁵ More especially, where, under the constitution and by-laws of a beneficial society, each member was entitled to receive in case of sickness three dollars per week, and bound to contribute such monthly dues as the society might declare, and entitled to twenty-four hours' notice before he could be expelled; an action lies for an expulsion made in the absence of a member, without notice or the waiver thereof, and neither the minutes of the proceedings of the society, nor oral testimony of the statements of the secretary to the society at the time of the expulsion, are admissible in favor of the society.⁶

¹ *Mechanics' Bank v. New York, &c.* 4 Duer, 480.

² *Colquitt v. Howard*, 11 Geo. 556.

³ *Wilson v. Bank, &c.* 29 Penn. 537.

⁴ *Southern Plank, &c., v. Hixon*, 5 Ind. 165.

⁵ *Long*, 29 Eng. L. & Eq. 194.

⁶ *Washington, &c. v. Bacher*, 20 Penn. 425.

(a) As to a claim for a *dividend*, see *King v. Paterson, &c.* 5 Dutch. 82.

CHAPTER XXXV.

CORPORATIONS. — BANKS.

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| 1. General liability. | 12. Checks. |
| 2. Negligence in collection of notes, &c. | 13. Liability for officers and servants. |
| 3. Deposits. | |

§ 1. THE rights and liabilities of *banking corporations* are often brought in question. (a) The remark already made in reference to corporations generally, that they are peculiarly the subject of *statutory regulation*, is perhaps emphatically true of banks. Our plan, however, does not permit or require any reference to the numerous and complicated provisions of the statute law upon this important subject.

§ 1 a. Examples of the liability of a bank are as follows: A bank is liable for the fraud or mistake of its cashier or clerk, in the *entries in its book*, and in the *false accounts of deposits*.¹ Or for the act of directors, in improperly *refusing to permit a person to subscribe for or transfer stock*.² So it is held to be the duty of a bank, to prevent the *entry of a transfer of stock*, until satisfied that the party claiming to make such transfer is duly authorized to do so. Hence an action lies against the Bank of England, for permitting stock to be transferred without authority, and refusing to pay the holder the dividends due thereon; although he knew of the forgeries six months before such dividends became payable (but not until after the transfers), concealed it from the bank, and did not demand the dividends until after the escape of the forger; mere concealment, in the absence of assent to, or adoption of, the acts of the offending party, not divesting his vested right of action.³ But a bank is not liable for the neglect of an officer, who does not act as

¹ Salem, &c. v. Gloucester, &c. 17 Mass. 1; Gloucester, &c. v. Salem. &c. Ib. 33; Foster v. The Essex, &c. Ib. 479.

² Ang. on Corp. 303.

³ Davis v. Bank, &c. 9 Moore, 747.

(a) No action will lie by one bank against another, for collecting its bills and presenting them for payment in a harassing manner, with a malicious intent to injure its credit. South, &c. v. Suffolk, &c. 1 Williams, 505.

the agent of the bank in the particular transaction complained of.¹

§ 2. A frequent claim against banks arises out of losses, alleged to result from some neglect or mistake on their part in the *collection of notes* intrusted to them for that purpose. It is held, that, when a bill or note is forwarded to a bank, which receives and undertakes to collect it, the bank is liable without special agreement, for any default of the agents or correspondents it employs for that purpose, in collecting or paying over the proceeds, or in fixing liability on the parties.² Thus, where a bank received for collection a note payable in another State, under an agreement to collect it for seven per cent., and neglected to give information of non-payment, and to return the note to the depositor within a reasonable time; it was held, that they were liable to an action.³ So one bank, receiving from another, for collection, a note indorsed by the cashier of the latter, is bound to present the note to the maker for payment, at maturity; and if not paid, to give notice of non-payment to the former bank; but not, unless by express agreement, to give notice to the other parties to the note.⁴ So a bank receiving a note or bill for collection, upon a good consideration, at a distant place, is liable for the neglect, omission, or other misconduct of the bank or agent to whom the note or bill is sent, unless there is some agreement to the contrary; and has such special interest, as will enable it to maintain an action for the injury sustained, without waiting for a recovery against itself.⁵

§ 2 a. But it is held no part of the duty of a bank to *employ counsel* and *bring suit* upon notes left with it on deposit.⁶ And the less rigorous rule than that above stated is sometimes adopted, that although a bank, by which notes and bills, payable at a distant place, are received for collection, without specific instructions, is bound to transmit, or to cause the same to be transmitted, by suitable sub-agents, to some suitable bank, or other agent, at the place of payment, for that purpose; yet, where suitable sub-agents are thus employed, in good faith, the collecting bank is not liable for their neglect or default. (a) Thus the D. & M. Bank, at M.,

¹ Thatcher v. The Bank, &c. 5 Sandf. 121.

⁴ Phipps v. Millbury, &c. 8 Met. 79.

² Commercial, &c. v. Union, &c. 1 Kern. 203; Bank, &c. v. Triplett, 1 Pet. 25.

⁵ Commercial, &c. v. Union, &c. 19 Barb. 391.

³ Wingate v. Mechanics' Bank, 10 Barr, 104.

⁶ Crow v. Mechanics', &c. 12 La. Ann. 692.

(a) But the latter bank is liable directly to the party injured, without reference to

the plaintiffs, having discounted a number of drafts, payable in W., transferred the same, by a general indorsement, and without any specific instructions, to the N. E. Bank, the defendants, in Boston, their general agents, for collection. The latter, having no correspondent in W., transferred the drafts, by a like general indorsement, to the C. Bank, in Boston, then and afterwards in good credit, for collection. The C. Bank transmitted the drafts to their correspondent, the Bank of the M., in W., for the same purpose. The C. Bank having subsequently failed, the defendants demanded the drafts of the Bank of the M. before they became due; the latter refused to deliver the drafts, but collected them, and applied the proceeds to the payment of a balance due them from the C. Bank; whereupon the defendants commenced an action against the Bank of the M. to recover the amount. Held, that the defendants, having acted in good faith, and the C. Bank being a suitable agent, had authority to employ the latter to make the collection, without proof of general usage; and that, as the drafts were trans-

any account between itself and the former bank. *Lawrence v. Stonington*, &c. 6 Conn. 521.

One bank may be agent for another. *Marine, &c. v. Ogden*, 29 Ill. 248.

The demand of a note sent to a bank, as agent, for collection, terminates the agency, and a refusal is evidence of conversion. *Potter v. The Merchants'*, &c. 28 N. Y. (1 Tiff.) 641.

A banker—unlike an attorney—is not liable in case, as for a tort, for failing to pay over money, collected in that capacity. The distinction is, that, in the hands of an attorney, the money collected never becomes his own; while a banker, by crediting the amount received, becomes a mere debtor of his employer. *Tinkham v. Heyworth*, 31 Ill. 519. See *Marine, &c. v. Rushmore*, 28 Ill. 463.

Money collected by bank A for bank B, placed by A with the bulk of its ordinary banking funds, and credited to B in account, becomes the money of A; which must, therefore, bear the loss resulting from any depreciation in the bank-bills, between the time of receiving them and B's drawing for the amount. *Marine, &c. v. Fulton*, &c. 2 Wall. 252.

The plaintiff placed in the hands of the defendants, bankers at Ottawa, a draft on A in Chicago, to be sent by the defendants to B, a banker at Chicago, for collection, the proceeds to be returned by express to the defendants, who were to incur no lia-

bility. The draft was sent with instructions as agreed. A collected it, by mistake, and, contrary to orders, credited the proceeds to the defendants, and, three days after, having the money in his hands, failed and made an assignment. Held, A was the agent of the plaintiff, not the defendants, who forwarded the draft as agreed; and, no negligence being shown, they were not liable. *Fay v. Stravon*, 32 Ill. 295.

Where notes issued by a bank had been sent to it through an express company, and while on the way were stolen by an agent of the company, who destroyed them after the amount had been paid by the company to the bank; held, the payment transferred the property in the notes to the company, who might recover the amount from the bank. *Hagerstown, &c. v. Adams*, &c. 45 Penn. 419.

The plaintiffs, bankers in the country, sent by express to the defendant, a bank in the city of New York, with which they kept an account, a sealed package of bank-notes, directed to the cashier. An employee of the express company delivered it to A, who was then, and had for some time been, assistant receiving teller, or acting as such, and who gave a receipt therefor; he being at the desk of the receiving teller, who was temporarily absent. A did not deliver it to the cashier, nor did he or the bank ever receive it or its contents. Held, the loss should fall upon the bank. *Hotchkiss v. The Artisans*, &c. 42 Barb. 517.

ferred to the defendants by a general indorsement, that bank might transfer them in the same manner to the C. Bank, and were not bound to make a restricted indorsement.¹ And when several agents are employed by a bank with distinct and separate duties, the knowledge of the residence of an indorser, by one of those agents, who was not the proper agent to give notice, is not the knowledge of the bank, and therefore cannot be set up to charge negligence in giving notice.²

§ 2 b. In reference to the very frequent case of loss arising from the act or default of *notaries*; although it is the duty of banks, receiving notes for collection, to place them in the hands of a notary, that they may be protested in due time, when necessary; yet, when received, in the ordinary course of business, for collection, the bank is not responsible for any failure of the notary to do his duty.³ And where a bank places a note for protest in the hands of the notary to whom its own business is uniformly intrusted, it will not be responsible for the failure of the notary to protest the note, or to notify the proper parties.⁴ So it is not sufficient, in answer to the *prima facie* defence of delivering the note to a notary, for the plaintiff to prove, in general terms, that the notary was a man of dissipated habits. He must prove that the notary was drunk at the time the note was given to him, or that his habits were so universally intemperate as to disqualify him for the discharge of an official act.⁵ So, to an action against a bank, for not duly demanding of the maker payment of a note left by the plaintiff with them for collection, it is a good defence, that the note was duly placed by the defendants in the hands of a competent notary public, for demand and protest, and that the negligence, if any, was on his part; the defendants having been the collecting agents for the plaintiffs for more than ten years, and having invariably placed their notes in the hands of a notary for demand and protest, with the knowledge of the plaintiffs, and it being shown that there was an invariable usage among the banks in Boston, including the defendants, when notes are sent to them for collection, to keep the same for payment until the close of banking-

¹ *Dorchester, &c. v. New England, &c.* 1 & M. 592. See *Warren, &c. v. Parker*, 8 Cush. 177; *Mechanics', &c. v. Earp*, 4 Gray, 221.

Rawle, 384.

² *Goodloe v. Godley*, 13 S. & M. 233.

³ *Citizens', &c. v. Howell*, 8 Md. 530;

⁴ *Agricultural, &c. v. Commercial, &c.* 7 S. & M. 592.

⁵ *Baldwin v. Bank, &c.* 1 La. An. 13; *Bellemire v. Bank, &c.* 1 Miles, 173.

hours, and, if not then paid, to put them in the hands of a notary.¹ So the plaintiff, the holder of a post-note, issued by a bank that failed before the note fell due, sent it for collection to the defendant, another bank, which caused payment to be demanded, and notice of non-payment to be given to the indorsers, on the day the note was due, without grace, whereby the indorsers were discharged, on the ground that by law the promisors were entitled to grace, although they had, while solvent, paid such notes without grace. At the time when the note fell due, the question, whether banks were entitled to grace on their post-notes had never been decided, and there was no uniform practice as to demanding payment of such notes, and giving notice to the indorsers, after the promisors failed. Held, this action, for negligence, could not be maintained.²

§ 3. In an action against a bank for negligence in failing to make a collection, evidence of the contents of a placard posted up in the bank, offering to make collections on certain terms, is admissible on the part of the plaintiff, after notice to produce it, and a failure to do so, or to account for it, without proof that the plaintiff read and acted on the faith of it.³

§ 4. In an action against a bank for undertaking to collect a note payable in another State, under an agreement to collect it for seven per cent., and for neglecting to give information of non-payment, and to return the note; it appearing that, at the time of trial, the note was barred by the statute of limitations, and that the bank had never until then returned it to the depositor, and there being no evidence of the insolvency of the maker; held, the measure of damages was the amount of the note, with interest, less the seven per cent.⁴ (a)

§ 5. The liability of a bank may also arise from *deposits* made in the bank. (b)

§ 6. Although a bank has no express regulation or by-law, relative to deposits of money and other valuable articles, and no account of them is required to be kept and laid before the directors

¹ Warren, &c. v. Suffolk, &c. 10 Cush. 582.

² Wingate v. Mechanics', &c. 10 Barr. 104.

³ Mechanics', &c. v. Merchants', &c. 6 Met. 13.

⁴ Ibid.

(a) But the insolvency of a debtor may be shown in mitigation of damages. Stone v. Bank, &c. 3 Dev. 408.

(b) See Carroll v. Cone, 40 Barb. 220.

and company; yet, if accustomed to receive them, with the knowledge of the directors, through its officers, and in its buildings and vaults, it is liable for such deposit.¹

§ 7. Where a deposit of money is *general*, the money may be used by the bank for its own purposes, and the bank merely becomes the *debtor* of the depositor to that amount.² And this is presumed to be the nature of the deposit, unless the money is in a sealed packet, bag, box, or chest; which receptacles neither the bank nor its officers have any right to open.³ In case of general deposit, the bank may at any time apply it to a note of the depositor, but is not bound to do so. It may recover a judgment upon the note, and then make the application; or, in case of a suit brought by the depositor or his assignee, may make an equitable set-off of the judgment.⁴

§ 8. In general, a bank is liable only to the actual depositor; and, when payment is made to him, cannot be charged with the money a second time by a third person, although legally entitled to the money, or defrauded by the depositor.⁵

§ 9. In an action against a bank, to recover the amount of a special deposit in gold, which had been fraudulently or feloniously taken from the vaults by its cashier and chief clerk; it appeared that the directors had no notice of the nature or amount of the deposit, or of the cashier's and clerk's doings, and that the latter had no *official* right to meddle with the deposit, except to close the doors of the vault upon it after banking-hours. The bank was held not liable for the loss. The decision was predicated upon the general principle of the law of bailments, that, where a deposit is made from which the depositary derives no profit, he is liable only for *gross* negligence in relation to such deposit.⁶

§ 10. The local manager of a branch bank, while engaged at the bank, suggested to a lady who had a deposit account, that higher interest might be obtained for her money, if she purchased two houses, for a sum which would pay off a mortgage held by a third person upon them, and also a lien held by the bank. She assented, and gave him her deposit note, for which he gave her a

¹ *Foster v. The Essex, &c.* 17 Mass. 479.

² *Bank, &c. v. Wister*, 2 Pet. 318; Amn. Law Reg. Feb. 1862, 239.

³ *Dawson v. The Real, &c.* 5 Ark. 283; *Foster v. Essex, &c.* 17 Mass. 504.

⁴ *Marsh v. The Onida, &c.* Amn. Law Reg. Feb. 1862, p. 239.

⁵ *Dacy v. New York, &c.* 2 Hall, 550; *Fulton, &c. v. New York, &c.* 4 Paige, 127.

⁶ *Foster v. The Essex, &c.* 17 Mass. 496; *Bottom v. Clarke*, 7 Cush. 487.

fresh deposit note, for the difference between the amount of the former note and the purchase-money, and retained the residue for the purpose of making the investment. This money the local manager appropriated to his own use, and the bank refused to bear the loss. Held, in an action against them, that they were liable, the jury having found, that the manager intentionally induced the lady to believe, that he was acting as the agent of the bank, and also, that as local manager he had authority from the bank to make an assignment of an equitable mortgage.¹

§ 11. A bank is not bound to apply money deposited to the payment of a bill of the depositor, unless it had assented to receive such money. It is only in relation to its own dealers or customers that such assent can be implied. And a bank is not bound to receive, on deposit, the funds of every man who offers them. It has a right to select its dealers, and the cashier is the proper officer to make the selection. And, when the bank is bound to receive a deposit, it must, to render the bank liable for its application, be made with the proper officer. The receiving teller, when there is one, is the only proper officer to receive deposits. And a paying teller, receiving the funds of a stranger, and promising to apply them to the payment of a bill or a note, acts as the agent of the stranger, and not of the bank, which is not liable for any breach or neglect of his promise.² (a)

§ 12. Another frequent ground of claim against banks relates to the drawing of *checks*. (b) And the general rule is, that, in an action against bankers for refusing to pay a trader's check, they having at the time sufficient assets of the trader; the latter may recover substantial damages, without proof of actual damage.³

¹ Thompson v. Bell, 26 Eng. L. & Eq. 536.

² Thatcher v. The Bank, &c. 5 Sandf. 121.

³ Rolin v. Steward, 25 Eng. L. & Eq.

341. See Marine, &c. v. Birney, 28 Ill. 90; Chicago, &c. v. Stanford, Ib. 68; Galena, &c. v. Kupfer, Ib. 332; Chicago, &c. v. Carpenter, Ib. 360; Reynolds v. Kenyon, 43 Barb. 585.

(a) A bank may incur liability, by violating its strict obligation in regard to the *redemption of bills*. Thus a person, having a large amount in bills of the bank at Ann Arbor, presented them at the counter of the bank for payment. The mode pursued by the officers of the bank, when a packet of bills was presented, was to take up one at a time, examine it, get from a table the requisite amount of specie, and pay it, and so proceed until banking hours had ex-

pired, and then refuse to make any more redemptions on that day. The bank refused to employ more than one person to count and redeem the money. Held, the conduct of the bank was evasive, and amounted to a refusal to redeem. The People v. Whittemore, 4 Mich. 27.

(b) In reference to the liability of one bank to another for negligence relating to a *forged check*; see Leavitt v. Stanton, Hill & Den. 413.

§ 13. A, in Scotland, being indebted in £460 to B, in England, paid £460 into a Scotch bank, in return for a letter of credit on an English bank, in this form: "Please honor the drafts of B, to the extent of £460, which charge to the bank." A inclosed this letter of credit in a letter to B, which arrived at B's office in B's absence. The only clerk in the office, but who had no authority to manage B's money transactions, opened the letter, took the letter of credit to the English bank, forged a check in B's name for the amount, received payment, and absconded. On B's return, he drew on the English bank for the £460; but his draft was dishonored, and the bank refused payment to him. B then, along with A, sued the Scotch bank in Scotland for repayment of the £460. Held, the bank was liable, unless it could show, that the English bank either actually paid B's draft when called on to do so, or did something which, as between the English bank and B, the English bank was entitled to treat as equivalent to payment.¹

§ 14. The plaintiff, being owner of an estate, employed an agent and receiver, who paid into the defendants' bank the rents of the estate, to an account headed with the name of the estate, to distinguish it from his private account. The receiver's private account being overdrawn, he transferred the balance of the estate account, known to be such by the defendants, to make up the deficiency due upon his private account. Upon a bill filed by the plaintiff against the bankers, to refund this balance; held, in equity, a person who deals with another, knowing him to have in his hands or under his control moneys belonging to a third person, must not enter into a transaction with him, the effect of which is a fraud on such third person. Decree for repayment of the amount.²

§ 15. The crossing of a check, payable to bearer, with the name of a banker, does not restrict its negotiability to such banker alone. Such crossing is, however, so far a protection to the owner of the check, that the banker, upon whom the check is drawn, ought not to pay it except through a banker; for, if he does so, and the person presenting it turns out not to be the lawful holder, the circumstance of his so paying would be strong evidence of negligence on the part of the banker, in the event of his seeking to claim credit

¹ *Orr v. Union, &c.* 29 Eng. L. & Eq. 1. ² *Bodenham v. Hoskins*, 13 Eng. L. & Eq. 222.

§ 19. In trover for certain checks, &c., drawn upon banks in New York, it appeared that the plaintiff was in the habit of sending checks to his agent in that city, to be converted into cash, for the purpose of buying Eastern money. The plaintiff indorsed the checks in question to his agent, and sent them to him for that purpose. The agent indorsed them to the defendants, who received them without notice of the agency, and paid value by passing the amount to the credit of the agent, and certifying checks on their bank for the amount of the credit. The agent misapplied the funds and failed. Held, that the title to the checks passed to the defendants, and therefore that the action would not lie.¹

§ 20. It seems that notice received by the cashier, in the course of the duties of his office, concerning matters pertaining to the business of the bank, is notice to the bank.

§ 21. The defendants, a banking company in New York, had funds belonging to the plaintiffs, who were incorporated, and in the exercise of banking powers, in New Jersey. The cashier of the defendants, also one of the managers of the plaintiffs' bank, loaned a portion of these funds, to be repaid upon demand, and notified the plaintiffs' cashier of the loan, by letter, which was duly received. The letter was immediately answered by the plaintiffs' cashier, and the investments were acknowledged by him to be satisfactory. Subsequently, the managers of the New Jersey Company met, and took action in relation to their New York affairs, but no objection was made or disapprobation expressed as to the loan. Held, that the plaintiffs were chargeable with notice that the loan had been made, as soon as that notice was received by their cashier, or at least from the time of the meeting of their board of managers; and, as by their silence they had ratified it, the defendants were not liable for permitting the funds to be withdrawn from their bank and loaned, even if it was done without authority.² (a)

¹ Case v. The Mechanic's, &c. 4 Comst. 166.

² New Hope, &c. v. Phoenix, &c. 3 Comst. 156.

(a) As to the liability of directors and stockholders of a bank, see Gunkle's, &c. 48 Penn. 13. As to liability in case of de-recision, Marine, &c. v. Chandler, 27 Ill.

525. For non-payment of bills, Suffolk, &c. v. Lowell, &c. 8 Allen, 355.

For unlawful sale of stocks pledged, Sitgreaves v. Farmers', &c. 49 Penn. 359.

CHAPTER XXXVI.

RAILROAD CORPORATIONS.

1. General remarks.
2. General liability of a railroad.
3. Damages caused by the laying out of a railroad; mode of assessing such damages; whether the statutory remedy is exclusive; what damages are or may be included in the assessment.
9. Obstruction, &c., of streets and ways; horse-railroads.
18. Injury to watercourses; overflowing of land, &c.
21. Railroads are *common carriers*; their rights and liabilities as carriers of merchandise; effect of express notices; commencement, termination, and nature and degree of liability.
30. Rights and liabilities as carriers of passengers; *baggage*; import and effect of *tickets*; payment of fare; right to eject passengers.
40. Duty and liability as to *time*; damages for delay and detention.
41. *Free passengers*.
42. Liability in case of negligence or fault of the party injured; *in pari delicto*.
45. Liability of a railroad for injury done to animals.
47. Liability in case of death.
49. Liability of the company for the acts or neglect of its agents or servants; liability to its own servants; liability in case of lease, &c.
50. Miscellaneous rights and liabilities.

§ 1. RAILROADS constitute a class of corporations, whose rights and liabilities we have occasion in various connections incidentally to notice. (See chapters 3 and 4; *Master, &c., Corporation, Bailment, Negligence, Nuisance, Animals, Common Carrier*.) In consequence of their great multiplication and constant activity; their necessary interference, in the act of construction, with the rights of property; the numerous and complicated trusts assumed by them; the large number and various offices of their agents and servants; and the dangers, many of them of an entirely novel character, incident to their mode of operation; (*a*) — these corporations give occasion to very frequent judicial investigations, the results of which are found embodied in numerous English and American decisions. So far as questions of this nature are determinable by the general rules of law, heretofore adopted in analogous cases, more especially the general rules pertaining to *common carriers*, which are substantially the same in transportation by land and by water, by individuals and by corporations; we refer

(*a*) "The defendants are a company entrusted by the legislature with an agent of an *extremely dangerous and unruly character*, for their own private and particular advantage." Per Tindal, C. J., *Piggot v. Eastern*, &c. 3 Man. Gr. & Sc. 240.

See, also, the remarks of Mr. Chief Justice Shaw, in *Shaw v. Boston*, &c. 8 Gray, 66.

It is held that the liabilities of railroads for torts are to be determined upon the same principles as those of private persons. *Stucke v. Milwaukee*, &c. 9 Wis. 202.

the reader to what has been and will be said in other portions of the present work. That portion of the law, more exclusively applicable to the subject in question, so far as it is settled by the decisions, we proceed summarily to state. It will be seen, however, that there are few subjects upon which the cases are more conflicting. New combinations of facts are constantly occurring, which call for modifications of principles previously supposed to be settled; and the prevailing tendency of the courts seems to be, to leave questions to the jury as questions of fact, instead of deciding them as matters of law, and thus building up a system of settled and authoritative rules and precedents. Moreover, railroads are a most prolific subject of express statutory regulation, either in their respective, special charters, or by general legislation. Hence arises, in the law relating to them, the want of uniformity necessarily incident to the diverse action of numerous legislative bodies, which, though aiming at the same results, of the public safety and convenience, adopt very various means for their accomplishment.

§ 2. The general principle is laid down, that a railroad company is responsible in damages, for doing what its charter does not authorize, or improperly doing what it does authorize. (a)¹ And it is held that railroads must exercise the utmost care and diligence in the enjoyment of their own privileges, to avoid doing injuries to others.²

§ 3. Except by virtue of express statutes, and unless chargeable with want of skill or prudence in making or working their roads, railroad companies are not liable for necessary consequential damages to persons, no part of whose land is taken by them.³ But the English statute (8 & 9 Vict. c. 8, § 68) makes railroads liable to

¹ *Turner v. Sheffield*, &c. 10 M. & W. 425.

² *Gorman v. Pacific*, &c. 26 Mis. 441.

³ *Monongahela*, &c. v. *Coons*, 6 W. & S. 101; *Radcliff v. The Mayor*, &c. 4

Comst. 195; *Case of the Philadelphia*, &c. 6 Whart. 25; *Richardson v. Vermont*, &c. 25 Verm. 465; *Henry v. Pittsburgh*, &c. 8 W. & S. 85.

(a) A railroad is bound to ordinary care to a shipper of freight during the loading. *Stinson v. N. Y. &c.* 32 N. Y. (5 Tiff.) 333.

That a railroad cannot be restricted by municipal authority under a statute concerning nuisances, see *State v. Jersey*, &c. 5 Dutch. 170. See, also, *New, &c. v. Higman*, 18 Ind. 77.

A railroad, authorized by law, and properly operated, is not a nuisance by reason

of the smoke, &c. from its locomotives. 10 Ohio (N. S.), 624.

A railroad company built a road through a street, constructing embankments which made the approach to the plaintiff's house less convenient, and prevented the surface-water from draining off. The work was approved by the city engineer. Held, the plaintiff could recover damages. *Parrot v. Cincinnati*, &c. 10 Ohio (N. S.), 624.

the owners of all lands *injuriously affected* thereby. And, under this statute, a railroad is liable for any act which would be a nuisance if done by an individual, or for which an action might be maintained, without the protection of the special charter.¹

§ 4. The charters of railroad corporations, like those of other companies, the purpose of whose incorporation requires the taking of land owned by individuals, provide of course for a suitable compensation for such land, and also the mode in which it shall be assessed and collected; usually by proceedings in form more *amicable* than an ordinary suit, and through a *committee, commissioners, or a special jury*. (a) Whether such statute remedy is *exclusive*, is a point upon which the authorities are somewhat conflicting.² But it is well settled, that an action at common law lies for appropriating land in violation of the requisitions of the charter; for omission of a statutory duty; or for want of care or skill in exercising the legal rights of the corporation.³ And an action is held to lie for damage done in the construction of a railroad, though no negligence is proved.⁴ But a subsequent purchaser of the land cannot maintain an action.⁵

§ 5. The further question has been raised, what damages are to be considered as included in the statutory assessment, when such assessment is made, and therefore cannot be made the subject of a subsequent action at common law. Upon this subject, it is re-

¹ Glover v. North, &c. 5 Eng. L. & Eq. 335; Hatch v. Vermont, &c. 25 Verm. 49. See Brock v. Connecticut, &c. 35 Verm. 273; Davis v. Russell, 47 Maine, 443; M'Aulay v. Western, &c. 33 Verm. 311; Cleveland, &c. v. Prentice, 18 Ohio St. 373; Pinneo v. Lackawanna, &c., 43 Penn. 361; Pennsylvania, &c. v. Schwarzenberger, 45 Penn. 208; Harvey v. Lackawanna, &c. 47 Penn. 428; East, &c. v. Hottenstine, 47 Penn. 28; Wadhams v. Lackawanna, &c. 42 Penn. 303; Central, &c. v. Hetfield, 5 Dutch. 206; Hetfield v. Central, &c. Ib. 571; Plymouth, &c. v. Colwell, 39 Penn. 337; Wells v. Somerset, &c. 47 Maine, 345; M'Aulay v. Western, &c. 33 Verm. 311; Grand, &c. v. County, &c. 14 Gray, 553.

² See Redfield on Railw. 173; Mason v. Kennebec, &c. 31 Maine, 215; Regina v. Eastern, &c. 3 Eng. Railw. Cas. 466; Knorr v. Germantown, &c. 5 Whart. 256; Watkins v. Great, &c. 6 Eng. L. & Eq. 179; White v. Boston, &c. 6 Cush. 420. And *contra*, Kennett, &c. v. Witherington, 11 Eng. Law & Eq. 472; Carr v. Georgia, &c. 1 Kelly, 524; 1 Am. Railw. Cas. 166 *et seq.*; Ambergate, &c. v. Midland, &c. 22 Eng. L. & Eq. 289.

³ Watkins v. Great, &c. 6 Eng. L. & Eq. 179; Dean v. Sullivan, &c. 2 Fost. 316; Furniss v. Hudson, &c. 5 Sandf. 551; Turner v. Sheffield, &c. 10 M. & W. 425.

⁴ New, &c. v. Huff, 19 Ind. 315.

⁵ Central, &c. v. Hetfield, 5 Dutch. 206.

(a) The constitutional provisions as to taking land for railroads are equally applicable, whether to steam or horse roads. Craig v. Rochester, &c. 39 Barb. 494. See, for an important case on this subject, People v. Kerr, 37 Barb. 357.

That a railroad line was located through

a lot, so as to greatly injure the value of the land not taken, is no trespass, it not appearing that the road could have been so well located in any other way. Cleveland, &c. Co. v. Stackhouse, 10 Ohio (N. S.), 567.

marked in a recent case, "An authority to construct any public work carries with it an authority to use the appropriate means. An authority to make a railway is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rock as through banks of earth. In a remote and detached place, where due precaution can be taken to prevent danger to persons, blasting by gunpowder is a reasonable and appropriate mode of executing such a work; and, if due precautions are taken to prevent unnecessary damage, is a justifiable mode. It follows that the necessary damage occasioned thereby to a dwelling-house or other building, which cannot be removed out of the way of such danger, is one of the natural and unavoidable consequences of executing the work, and within the provisions of the statute. Of course, this reasoning will not apply to damages occasioned by carelessness or negligence in executing such a work. But where all due precautions are taken, and damage is still necessarily done to fixed property, it alike is within the letter and the equity of the statute, and the county commissioners have authority to assess the damages."¹

§ 6. In conformity with these views, the owner of land damaged by the blasting of rocks, in the construction of a railway, can maintain no action therefor, after being compensated for the land of which such rocks made a part. The damage is held to be included in such compensation.² So a railroad is not liable to an action, for entering upon adjoining lands, and occupying them with temporary dwellings, stables, and blacksmith-shops, if necessary for its purposes.³ So, although land damages are reduced by false representations of the company's agents as to the future mode of constructing the road; the land-owner still cannot recover damages beyond the appraisal, if the road has been built prudently and properly. All negotiations are merged in the adjudication.⁴

§ 7. Damages cannot be allowed by commissioners to a turnpike for a diminution of its business by a railroad on the same line of travel.⁵ Nor, in general, for consequential and prospective damages.⁶ So exposure of remaining land to fires, by engines on

¹ Per Shaw, C. J., *Dodge v. Co. Commis.* 3 Met. 383.

² *Dearborn v. Boston, &c.* 4 Fost. 179; *Sabin v. Vermont, &c.* 25 Verm. 363; *Dodge v. Co. Commis.* 3 Met. 380; *Brown v. Providence, &c.* 5 Gray, 35.

³ *Lauderbrun v. Duffy*, 2 Barr. 398.

⁴ *Butman v. Vermont, &c.* 1 Wms. 500.

⁵ *Troy, &c. v. Northern, &c.* 16 Barb. 100.

⁶ *Albany, &c. v. Lansing*, 16 Barb. 68.

a railroad, is held not a proper element of damages in an appraisal.¹

§ 8. But, on the other hand, the appraisal of land damages is held a bar to claims for injuries by fire, and obstruction of access to buildings by engines, exposing persons or cattle to injury.² So, although such damages were unknown to the appraisers, or not susceptible of anticipation, at the time.³ But the excavation of an adjoining lot, and thus weakening the foundations of a house, and erecting an embankment in the highway, so as to darken lights and render a house unfit for use; do not constitute a *taking of land* (compensated by appraisal), but are injuries for which an action may be maintained.⁴ (a)

§ 9. The necessary interference of railroads with *streets* or *highways* gives rise to an important and difficult class of questions for legislative and judicial regulation and settlement.⁵

§ 10. A railroad track may lawfully be allowed *upon a street*; and adjoining proprietors cannot maintain an action for the inconvenience caused to them by the work of excavation and tunneling.⁶ (b)

¹ *Sunbury, &c. v. Hummell*, 27 Penn. 99, (two Judges dissenting). See *Railroad Co. v. Yeiser*, 8 Barr, 366; *Lehigh, &c. v. Lazarus*, 28 Penn. 203.

² *Railroad Co. v. Yeiser*, 8 Barr, 366; *Mason v. Kennebec, &c.* 31 Maine, 215; *Aldrich v. Cheshire, &c.* 1 Fost. 359.

³ 1 Fost. 359.

⁴ *Bradley v. New York, &c.* 21 Conn. 294. See *Wryley, &c. v. Bradley*, 7 E. 368.

⁵ See *Veazie v. Mayo*, 49 Maine, 156; 45 Ib. 560; *Veazie v. Penobscot, &c.* 49 Maine, 119; *Newcastle, &c. v. North, &c.* 5 Hurl. & N. 160; *Com. v. Haverhill*, 7 Allen, 523; *Warren, &c. v. State*, 5 Dutch. 353; *North, &c. v. Dale*, 8 Ell. & B. 836; *Com. v. Capp*, 48 Penn. 53; *Com. v. Hartford, &c.* 14 Gray, 379; *Albany, &c. v. Brownell*, 24 N. Y. (10 Smith) 345.

⁶ *Plant v. Long Island, &c.* 10 Barb. 26.

(a) Stone, excavated in constructing a branch railroad through a man's land, under a permissive license from him to construct and use the tract thereon, and hold the same so long as it shall be used for railroad purposes, remains his property, and, if not used in the construction of the branch track, cannot be removed and devoted to other purposes without his permission. *Chapin v. Sullivan, &c.* 39 N. H. 564.

Where a statute exempts a *dwelling-house* from liability to be taken by a railroad company; the garden, orchard, and curtilage are not exempted. *Wells v. Somerset, &c.* 47 Maine, 345.

In an inquest to recover damages done to land by a railroad, the plaintiff's title is a proper subject of inquiry; and, upon exceptions, the decision of the jury will be presumed correct. *Directors, &c. v. Railroad*, 7 W. & S. 236.

Where a railroad is authorized only to "enter upon any land, to survey, lay down, and construct its road;" "to locate and construct branch roads from the main road to any town or places in the several counties through which the said road may pass;" to appropriate land for "necessary side tracks," and "a right of way over adjacent lands sufficient to enable such company to construct and repair its road;" and such company has located, and is engaged in the construction of its permanent main road along the north side of a town: it is not authorized to appropriate a temporary right of way, for the term of three years, along the south side, to be used as a substitute for the main track while the same is in course of construction along the north side. *Currier v. Marietta, &c.* 11 Ohio (N. S.), 228.

(b) In Massachusetts, a railroad company has no right to use a highway as a

§ 11. Where the grade of a street was altered by a railroad by consent of the government of the city, who, as required by statute, had assessed damages to parties injured; held, no action would lie against the railroad.¹ (a)

§ 11 a. Where a crossing renders the highway dangerous or inconvenient, the railroad is responsible, though the town may also be liable.² (b)

¹ *Chapman v. Albany*, &c. 10 Barb. 360; *Adams v. Saratoga*, &c. 11 Ib. 414; *Wolfe v. Covington*, &c. 15 B. Mon. 404.

² *Gillett v. Western*, &c. 8 Allen, 560.

part of its freight yard; but it has a right to pass and repass over a highway in making up its trains and shifting its cars, to a reasonable extent and in a reasonable manner, without encroaching upon the rights of others who have an equal right to use it. *Gahagan v. Boston*, &c. 1 Allen, 187.

(a) A city, within the lawful exercise of its authority allowing railroad tracks in the streets, is not liable for damages. *Murphy v. Chicago*, 29 Ill. 279.

After a plank-road had been constructed, a railroad was built, crossing, and running almost parallel with it, for a quarter of a mile, and so near, as was alleged, as to render travelling on the plank-road dangerous, owing to the fright of horses, whereby the franchise of the plank-road company was depreciated in value. The railroad had been constructed with care, skill, and good faith. Held, the plank-road company, having had their damages assessed by proceedings under the statute, in which proceedings the question of location was examinable, could not afterwards maintain an action. *Lafayette, &c. v. New Albany*, &c. 13 Ind. 90.

(b) A railroad company constructed its road across the main street of a village, about a foot and a half above the level of the street. The street was twelve rods wide, with two travelled paths, one on each side, and an open common between. The company, being required by its charter to restore any highway intersected, so as not to impair its usefulness, put the two travelled tracts in proper condition for passing with vehicles, but made no other crossing. About midway between the two paths, they constructed a culvert under the timbers of the track, to let the water accumulating from rains pass through, which was left uncovered. The plaintiff, walking across the street upon the railroad track, when the culvert was filled with snow and could not be seen, fell into it, and was injured. Held, the railroad was liable. *Judson v. New York*, &c. 29 Conn. 434.

Where, by a city charter, its authorities are vested with exclusive control over the streets, and grant permission to locate railway tracks along a street; the owners or occupants of property fronting such street cannot enjoin the laying of such tracks, nor recover any damage or compensation. *Moses v. Pittsburg*, &c. 21 Ill. 516.

The fee-simple title to the streets of the city of Chicago, as in other cities, is vested in the municipal corporation. *Ib.*

Steam, as a motive power, may be used, along the streets of a city, by proper permission. *Ib.*

The city of Milwaukee, in its corporate capacity, has not such an interest or property in the streets and public squares, as to allow it to maintain a bill for an injunction to restrain the laying down of rails therein. The abutments own the fee to the centre of the streets, and, though the certain use thereof has been dedicated to the public, that dedication cannot pass the property therein. *Milwaukee v. Milwaukee*, &c. 7 Wis. 85.

Where a city railroad company, by authority of the city, and with the sanction of the legislature, has constructed a railroad, and is running cars thereon, through the streets; the public have the right to drive upon and across their track; but not so as to interfere with the proper business of the company. *Wilbrand v. Eighth*, &c. 3 Bosw. 314.

The company is entitled to the unrestricted use of its rails for the progress of its cars, within that limit of speed which the law allows them, and the driver of any other vehicle, being unnecessarily on the track, is bound to exercise greater care than if upon the common pavement, to avoid collision, and to see that an approaching car is not impeded; and if, through negligence or wilfulness in this respect, a collision ensues, he should not have damages against the company, even though the servants of the latter are also in fault. *Ib.* See p. 346.

§ 11 *b*. A railroad is responsible, without affirmative proof of negligence, for injury caused, without fault of the person injured, by a running switch over the crossing of the track on a highway.¹

§ 11 *c*. But the rules, regulating the distance from each other at which trains shall run, are solely intended to protect the property of the company, and for the safety of their employees and passengers. In a suit for injury at a crossing not public, negligence in the company is not to be inferred from the proximity of their trains. And no action can be maintained, without proof of negligence, for injury to a child, about five years of age, who, in crossing the track between a coal train and an engine and tender closely following, was struck by the engine.² Nor does an action lie for injury caused by laying a track and running a train across a street in a city, without positive proof of negligence. In reference to speed, it is generally a question of fact in each case, whether the rate was excessive or dangerous, depending somewhat upon the safeguards against accident. But if the rate was the usual one, no such question arises.³

§ 12. Where a street is taken by a railroad, the remedy of an abutter is not by statute, but the ordinary one at law, to recover for a consequential injury. And the lot and street adjoining, as to the owner of the former, constitute but one piece of property; an injury to the latter is an injury to the former, and to the whole property.⁴

§ 13. In Vermont, a land-owner may recover damages for using land adjoining the land taken for a cart-way, where six rods were

¹ *Brown v. New York, &c.* 32 N. Y. (5 Tiffa.) 597.

² *Philadelphia, &c. v. Spearen*, 47 Penn. 300.

³ *Wilds v. The Hudson, &c.* 29 N. Y. (2 Tiffa.) 315.

⁴ *Protzman v. Indianapolis, &c.* 9 Ind. 467.

But a city railroad company or their employees have no right to regulate or prohibit travel on a public street where their track is laid, or any part of it; and, if the employees forcibly run a horse and wagon from the track, the company is liable for all damages. *Fettritch v. Dickenson*, 22 How. (N. Y.) 241.

The proviso to § 14 of the charter of the Connecticut and Passumpsic River Railroad Company gave the land owner no right to cross the track, which could not be controlled and regulated by subsequent general legislation, and Compiled Statutes, c. 26, § 43, had the effect to regulate and define the right of crossing, conferred by that proviso. *Connecticut, &c. v. Holton*, 32 Verm. 43.

Under this section (43), neither the railway company nor the adjacent land-owner have the right to determine separately, and without the consent of the other party, the number, character, and location of the farm crossings. *Ib.*

And the land-owner has no right to build a crossing at any other place than that fixed by the commissioners, or agreed upon by the parties, nor to cross the track at any other point. *Ib.*

That a (steam) railroad cannot be made *longitudinally* along a highway, without the most express authority; see the forcible remarks of Mr. Chief Justice Shaw, in *Inhabitants, &c. v. Connecticut, &c.* 4 Cush. 71.

allowed to be taken, by the company, throughout the line of the road, which would give ample space for cart-ways upon the land taken.¹

§ 14. A statute, requiring railroads to construct *under-passes* for the accommodation of the public travel on ways, does not apply, unless such way has been laid out agreeably to statute law, or been used by the public for at least twenty years.²

§ 15. Where the statute provides for an action for obstructing the safe and convenient use of a *private way* in the construction or use of a railroad; the company are liable, though the road be not made or managed illegally or improperly.³ But the question of obstruction is for the jury.⁴

§ 16. *Horse-railroads*, being usually constructed upon and along public highways, must, of course, more frequently than any other class, occasion interference with the privileges incident to such highways. (a) While they constitute, in and about large towns and cities, one of the greatest of modern conveniences; it must

¹ *Sabin v. Vermont*, &c. 25 Verm. 363.

² *Northumberland v. Atlantic*, &c. 35 N. H. 574.

³ *Concord, &c. v. Greely*, 3 Fost. 237.

See *Clark v. The Boston*, &c. 4 Ib. 114; *M'Lauchlin v. Charlotte*, &c. 5 Rich. 583.

⁴ *Greenwood v. Wilton*, &c. 3 Fost. 261.

(a) See p. 344, n.; *Cincinnati, &c. v. Cummins*, 14 Ohio St. 523; *People v. Kerr*, 37 Barb. 357; *Brooklyn, &c. v. Coney*, &c. 33 Barb. 364; *Com. v. Temple*, 14 Gray, 69; *Plymouth, &c. v. Colwell*, 39 Penn. 337. In New York, it seems, a city cannot permit horse railroads to use the streets, without special authority from the legislature. After the legislature has given the city this power, the city may grant the right, on such terms and conditions as to the use of the track and streets as it may think proper. Thus the charter of the New York and Harlem R. R. Co., of 1831, provided, that the road should not be constructed in the streets without permission from the city, which the same charter authorized to grant permission, and the right was reserved to the city to regulate the use, &c.; the city authorized the company to lay the track, with the proviso that the city should have the power to regulate the manner of use, and the kind of propelling power, and that the permission should not be binding, until the company covenanted under seal to perform the conditions; they did so covenant; afterwards the city prohibited the use of steam in the streets. Held, the prohibition did not violate the charter of the company; the permission to lay the track did not take away the power to make the prohibition; the city could not, without express authority from the legislature, make any contract which would deprive it of control over the streets; the company's

agreement was a restriction upon and not a transfer of their power or franchise, and therefore was binding; and the above ordinance, prohibiting the use of steam, is one which it is properly the duty of the police commissioners to enforce; it relates either to police or health, if not to both. *New York, &c. v. New York*, 1 Hilt. 562.

In Louisiana, the streets of an incorporated city are destined for public use, but not for a particular mode of public use. The city of New Orleans has the right to sell the right of way in the streets to private individuals for a specified time, with a privilege of laying rails and running horse-cars over them, according to a tariff to be fixed by the common council. This right is conferred upon the city by the act incorporating it, and upon all incorporated cities or towns in the state by the act of 1856, relative to the organization of the corporations for works of public improvement. *Brown v. Duplessis*, 14 La. An. 842.

In Indiana, establishing a railroad in the street of a city is not a taking of private property, within a statute relating to the assessment of damages for such taking. The remedy, if any, is at common law. *New, &c. v. O'Daily*, 12 Ind. 551.

A horse-railroad company cannot complain that another railroad track is allowed to cross theirs; the passage of its cars is not thereby impeded. *Brooklyn, &c. v. Brooklyn*, &c. 33 Barb. 420.

be admitted, that, to reconcile their indefinite multiplication with the safe and comfortable use of the streets over which they are laid out, is likely to be a very difficult problem of State legislation and municipal regulation. A very recent case in Massachusetts presents an interesting view of the relative rights and duties of a horse-railroad corporation, claiming under its charter an exclusive appropriation of a portion of the highway, and of the citizens at large, justifying an obstruction of the railroad, by virtue of an alleged paramount right to use the whole or any part of such highway for ordinary and general travel. The case derives additional interest from the fact, that it gave occasion to one of the most recent recorded judgments of the late Chief Justice, who has just withdrawn from the bench, after contributing to the jurisprudence of his State and of the age a collection of judicial opinions, which, tried by the compound test of number and value, has rarely been excelled in any country or at any period.

§ 17. Indictment on § 5 of the statute of 1856, chapter 302, entitled "An Act to incorporate the Malden and Melrose Railroad Company," which provided as follows: "If any person shall wilfully and maliciously obstruct said corporation in the use of said road or tracks, or the passing of the cars or carriages of said corporation thereon, such person and all who shall be aiding or abetting therein, shall be punished by a fine not exceeding five hundred dollars, or may be imprisoned in the common jail for a period not exceeding three months." At the trial in the Court of Common Pleas, it appeared from the evidence on the part of the Commonwealth, that the defendant was driving his heavily loaded wagon from Charlestown to Boston in a public street, with one wheel in the track of the Middlesex Railroad, when one of the cars of the Malden and Melrose Railroad came up behind him. The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the horse-cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the cars came up, the conductor asked the defendant if he would please to remove his team from the track. The defendant did not, but continued upon it at the same rate of speed several hundred feet, and then turned off. It also appeared, from the same testimony, that it was usual for those in charge of vehicles like that of the defendant to drive them with one wheel in the track, and that they could be drawn

much more easily in that place than in any other part of the street. There was no evidence that the defendant got upon the track, in the first instance, with the intention of obstructing the cars, or that he changed his rate of speed on the approach of the cars, or that he used the street, or did any act in any other than the usual manner. There was no other evidence than this bearing upon the question of malice. As bearing upon the question of intention, the defendant offered to show that it is not the custom for those in charge of vehicles to turn out when a car comes up behind them, until it suits their convenience. The evidence was objected to, and ruled out. The defendant contended that malice must be shown, and that it could not be inferred from the mere fact that the defendant used a part of the street the most convenient to him in the ordinary way, knowing that the car would be obstructed by such use. The defendant also prayed for the following instructions: 1. If the jury find that the defendant was using the highway in the ordinary way, they must find for the defendant, without reference to the motive of his act. 2. In the absence of regulations on the subject, the corporation has no right to drive its cars at any particular rate of speed; and the mere slacking of the speed of the car by the defendant, if it was moving at the ordinary and proper rate of speed, was no obstruction within the meaning of the statute. 3. There is not sufficient evidence to warrant the jury to find a verdict of guilty. 4. The right of the horse-railroad company to use the highways is subject to the right of the public to use such highways as they had previously done. 5. If the jury find that the defendant went upon the track in the ordinary use of the street, without intending to obstruct the car, and continued on the track after the car came up behind him for his own convenience, and because that was the best part of the street to drive on, the defendant is not guilty. 6. In order to establish the crime of obstructing the cars, some act must be shown besides the use of the street in the ordinary way. 7. The act incorporating the railway company created no new crime; it merely attached a new penalty. 8. In the absence of regulations as to the rate of speed, and the mode of use of the track, they have no right to any given rate of speed. The presiding judge (Bishop, J.) declined to give any of the instructions, as prayed for, but did instruct the jury, that although the public might drive their vehicles over the tracks of the railroad when the cars were not

approaching, the corporation had a prior right to the track ; and if the jury should find that the defendant was on the track, and hindered the progress of the car, and was requested to remove from it, and could reasonably have removed, he was bound so to do ; and his remaining there, knowing that the car would be thereby obstructed, intending thereby to obstruct it, in the use of their track, was a wilful and malicious obstruction within the meaning of the statute, and that it was not material whether the defendant stopped his vehicle, or whether it continued to move on the track at the ordinary rate of such vehicles ; that no other proof of malice was necessary than that the defendant knowingly and intentionally obstructed the car, although he may have made only the ordinary use of the street. To all of these rulings and instructions, and refusals to instruct, the defendant alleged exceptions. SHAW, C. J. :—“ Since horse-railroads are becoming frequent in and about Boston, and are likely to become common in other parts of the Commonwealth, it is very important that the rights and duties of all persons in the community, having any relations with them, should be distinctly known and understood, in order to accomplish all the benefits, and, as far as practicable, avoid the inconveniences, arising from their use. This is important to proprietors and grantees of the franchise, who expend their capital in providing a public accommodation, on the faith of enjoying with reasonable certainty the compensation in tolls and fares which the law assures to them ; to all mayors, aldermen, selectmen, commissioners or surveyors specially appointed by law for the care and superintendence of streets and highways ; to all persons for whose accommodation in the carriage of their persons and property these ways are specially designed ; and to all persons having occasion to use the ways through or across which these horse-railroad cars may have occasion to pass. These railroads being of recent origin, few cases have arisen to require judicial consideration ; and no series of adjudicated cases can be resorted to as precedents to solve the various new questions to which they may give rise. But it is the great merit of the common law, that it is founded upon a comparatively few, broad, general principles of justice, fitness, and expediency, the correctness of which is generally acknowledged, and which at first are few and simple ; but which, carried out in their practical details, and adapted to extremely complicated cases of fact, give rise to many, and often perplexing questions ; yet

these original principles remain fixed, and are generally comprehensive enough to adapt themselves to new institutions and conditions of society, new modes of commerce, new usages and practices, as the progress of society in the advancement of civilization may require. In the first place, all public easements, all accommodations intended for the common and general benefit, whatever may be their nature and character, are under the control and regulation of the legislature, exercising the sovereign power of the State, either by general law or special enactment. It may be done by a charter or special act of incorporation in case of a bridge over broad navigable waters; or, where the necessity for its exercise is of frequent recurrence, it may be by the delegation of power to special tribunals, or municipal governments, by general laws. Again: when the entire public, each according to his own exigencies, has the right to the use of the highway, in the absence of any special regulation by law, the right of each is equal; but as two or more cannot occupy the same place at the same time with their persons, their horses, carriages, and teams, or other things necessary to their use, each is bound to a reasonable exercise of his absolute right in subordination to a like reasonable use of all others; and not to encumber it over a larger space, or for a longer time, to the damage of any other, than is reasonably necessary to the beneficial enjoyment of his own right. If an adjacent proprietor has occasion to stop at his own gate with a carriage or team, if he has occasion to deliver wood, coal, or other necessities, or, if he is a trader, to deliver or receive merchandise, he must place his team or carriage, for the time being, in such a manner as to obstruct the way for the use of others as little as is reasonably practicable, and remove the obstruction within reasonable time, to be determined by all the circumstances of the case. So in the actual use of the highway. Each may use it to his own best advantage, but with a just regard to the like right of others. Persons in light carriages, for the conveyance of persons only, have occasion, and of course a right, when not expressly limited by law, to travel at a high rate of speed, so that they do not endanger others. But all foot-passengers, including aged persons, women, and children, have an equal right to cross the streets, and all drivers of teams and carriages are bound to respect their rights, and regulate their speed and movements in such a manner as not to violate the rights of such passengers. So in regard to drivers

of fast and slow carriages, each must respect the rights of the other. Take a single illustration: if a heavily loaded ox-team be passing along a street wide enough for only one carriage, say fourteen feet, and other fast carriages follow, these last must, for the time being, be restrained to their speed, because this necessity results from these circumstances,—the narrowness of the way, and the ordinary slowness of the ox-team ahead. If parties thus travelling in the same direction should come to a portion of the way wide enough for carriages to pass each other, say twenty feet wide, it is obvious that if the driver of the heavy team would turn to either side, it would give the fast team room to pass, whereas, if he should keep the middle, the five or six feet on either side would not permit any carriage to pass. Now, supposing no impediment to intervene, and no circumstance should render it dangerous for the driver of the slow team to bear off, in our opinion it would be his duty to do so, although it might suit his convenience better to keep in the middle; and his refusal thus to bear off would be an abuse of his own equal and common right, for which, if injurious to another, an action would lie; and, if it was a public highway, the party would subject himself to a public prosecution. In some few cases, the regulation of the use of the highway is important enough to require a rule of positive law, requiring each traveller, when meeting, to turn to the right of the centre; in some States to the left. But the circumstances under which travellers may be placed in relation to each other are so various, that it would be impracticable to prescribe any positive rule approaching nearer to certainty than the rule of the common law, that each shall reasonably use his own right in subordination to the like reasonable use of all others. With these views of the law regulating the use of public ways, we will examine the present case, as it appears on the exceptions. We understand that a horse-railroad and cars are a modern invention, designed for the carriage of passengers, and, though not moving with the speed of steam-cars, yet with the average speed of coaches, omnibuses, and all carriages designed for the conveyance of persons. The accommodation of travellers, of all who have occasion to use them, at certain rates of fare, is the leading object and public benefit for which these special modes of using the highway are granted, and not the profit of the proprietors. The profit to the proprietors is a mere mode of compensating them for their outlay of capital in pro-

viding and keeping up this public easement. A franchise for the railroad, which the defendant was accused of obstructing, had been duly granted to the proprietors, which grant included the right to lay down tracks on a public highway, and also to use and maintain horse-cars thereon for the carriage of passengers. Every grant, by an obvious and familiar rule of law, carries with it all incidental rights and powers necessary to the full use and beneficial enjoyment of the grant; and when such grant has for its object the procurement of an easement for the public, the incidental powers must be so construed as most effectually to secure to the public the full enjoyment of such easement. It appears that the proprietors of the horse-railroad, having received a franchise, had laid down a railway track, and had procured horse-cars, with suitable conductors, and were in the actual use of the track. The defendant, with a heavily loaded team,—it does not appear whether an ox-team or horse-team,—was on the public street driving from Charlestown to Boston, with one of his wheels on the railroad track, when the cars came up behind him. The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the cars came up, the conductor asked the defendant if he would remove his team from the track; he did not, but continued upon it, at the same rate of speed, several hundred feet, and then turned off. Several things are here to be observed. The cars could only pass on one precise line. The wagon could deviate to the right or to the left, within the limits of the travelled part of the road. The public, by the grant of the franchise, had granted the right to move on that precise line, and had given to all passengers the right to be carried on that line at the usual rate of speed at which passengers are carried by horses, subject only to occasional necessary impediments. The cars cannot so move, and the passengers cannot be so carried, whilst the wagon moves on the track. No impediment is shown to prevent the wagon from turning out. The wagon, therefore, is, for the time being, an unnecessary obstruction of the public travel, and therefore unlawful. It is stated among the above-mentioned circumstances in the bill of exceptions, as if the two vehicles were upon an equality in this respect, that there was room on either side for either vehicle to turn out. But this is mere illusion; the wagon could turn out,

the cars could not; *ad impossibilia lex non cogit*. It is said, above, that it is usual for those in charge of heavy and slow teams to drive them with one wheel on the track, and that they could be driven much more easily in that place than in any other part of the street. This is no justification. Whilst the track was not required for the cars, perhaps the teamster had a right so to use it. But, when required for the cars, which could pass in no other mode, he had no legal right to consult his own convenience, to the great inconvenience, the actual injury of the equal rights of another. It is no excuse that the defendant did not get upon the track in the first instance with the intention of obstructing the passage of the cars, or that he did not slacken his rate of speed on their approach; it is a nuisance, if, for his own benefit, he violates the rights of others; and if this consists in the violation of a public right, indictment is the appropriate remedy for its vindication and redress. Nor is express malice, a disposition or desire to cause damage to another, as in case of malicious mischief, necessary to the completion of the offence. It is a nuisance if one wilfully seeks and pursues his own private advantage, regardless of the rights of others, and in plain violation of them; it is a wrong done. And as every man must be presumed to intend all the necessary natural and ordinary consequences of his own acts, it is a wilful and intended wrong; it is malice,—a thing done *malo animo*,—in the sense of the law; and no other malice need be proved, to show the act to be a nuisance. If it be said that the obstruction in this case was very slight, that the cars were delayed but a very short time,—the answer is, that this is very true, and the injury may be trifling in itself, but vindicated and justified as it is in the argument, on the ground of right, it tests a principle of very great importance. If the driver of a heavily loaded truck or wagon may, for his personal convenience, use one rail of the track, wilfully, for a few hundred feet,—others may use the other rail for the like purpose, and for any distance which suits their convenience. Cars which, at the ordinary speed of horses in carriages, would pass a given space in one hour, may be three or four in accomplishing it. Passengers whose business requires them to be at the place of destination at a fixed time, and who expect and have a right to expect that it will be reached in that time, may find their business greatly deranged. Men who, relying on the establishment of horse-cars for their daily passage, have fixed their

domicil in one place and their ordinary place of business in another, may find their plans of life thus defeated. Indeed, without pursuing the effect of the right contended for into all its consequences, the establishment of such a principle might essentially impair the value of real estate in many situations. We will now consider some of the points specially raised by the bill of exceptions. 1. The defendant contended that malice must be shown, and that it could not be inferred from the mere fact that the defendant used a part of the street, the most convenient to him, in the ordinary way, knowing that the car would be obstructed by such use. If the term malice is here used in the sense of ill-will, a desire to injure another, as an actuating motive, the opinion of the Court is, that malice need not be shown, but that, if a wilful intent to follow his own convenience in violation of the equal rights of others, exist, it is sufficient, and no other malicious motive need be proved. 2. The defendant contended, that in the absence of regulations on the subject, the corporation has no right to drive its cars at any particular rate of speed, and the mere slacking of the speed of the car by the defendant, if he was moving at the ordinary and proper rate of speed, was no obstruction within the meaning of the statute. This position we think is untenable. We think the corporation had a right, and, in reference to passengers, were bound to move at the rate of speed usual for vehicles for the carriage of passengers drawn by horses, provided the right could be enjoyed without preventing the loaded team from moving at its usual and proper speed; and both could be done by the team ahead turning off the track, which the car in the rear could not do. It was therefore the duty of the team, in the reasonable use of the public right, to do it. What was the usual and proper rate of speed of the one was not that of the other. 3. The evidence was properly left to the jury. 4. It was contended, that the right of the horse railroad company to use the highways is subject to the right of the public to use such highways, as they have previously done. This position we think manifestly unsound. The Legislature having granted a new and peculiar use of the highways, the right of the public to use them as they had done is thereby qualified, and must be adapted to such new use. Suppose the legislature should authorize a canal to cross a highway, with a draw, to be raised while boats are passing; the public cannot use the highway, as they have previously done, at all times, but

must use it in subordination to the new right granted. So here, the law having authorized a horse-railroad, which cannot deviate from one line, other vehicles must conform their use of the way to such new and authorized use, although it prevents them, to some extent, from using it as they had previously done. The 5th, 6th, 7th, and 8th prayers for instructions, we think, were rightly rejected, for reasons which are already sufficiently stated. The instructions actually given were, in our opinion, correct in law, carefully guarded, and precisely adapted to the circumstances of the case, and therefore the exceptions must be overruled, and *judgment entered on the verdict.*"¹

§ 18. A railroad is liable for any injury to *riparian proprietors*, beyond what is necessary for the use of its charter.² As for unnecessary obstruction of a stream, by means of bridges, or insufficient sluices.³ So, even though a bridge was erected by another company before incorporation of the defendants.⁴ So, although not expressly required by statute to make the openings, by the want of which land is overflowed.⁵ So, if there is no difficulty in constructing a culvert under a railroad, to carry off the water from a meadow over which the railroad passes, the railroad company will be liable for flowing the meadow, if they do not make a culvert, with ditches to and from it, sufficiently low to drain off the water.⁶ So the proprietor of a mill-pond may recover for damage caused by a railroad across it, though the dam be authorized by the legislature upon a navigable river; the conditions of the act not being observed in its construction.⁷ So a riparian owner may claim statutory damages, for cutting off a spring below high-water-mark, on a navigable river.⁸ So a railroad is liable, for building an embankment at the mouth of a navigable creek, in which the plaintiff has a prescriptive right of storing, landing, and rafting lumber for the use of his saw-mill; and thus obstructing the flow of water.⁹ So, notwithstanding an appraisal, a railroad

¹ *Com. v. Temple*, Mass. S. J. C. 1860. Am. Law Reg. Sept. 1860, p. 678. See *Com. v. Hicks*, 7 Allen, 573.

² *Hooker v. New Haven*, &c. 14 Conn. 146; *Boughton v. Carter*, 18 Johns. 405; *Steel v. Southeastern*, &c. 32 Eng. L. & Eq. 366. See *Tillotson v. Hudson*, &c. 15 Barb. 406.

³ *Mellen v. Western*, &c. 4 Gray, 301; *Hatch v. Vermont*, &c. 25 Verm. 49; *March v. Portsmouth*, &c. 19 N. H. 372.

⁴ *Brown v. Cayuga*, &c. 2 Kern. 436; acc. *Preston v. Eastern*, &c. 30 Law Times, 288.

⁵ *Lawrence v. Great*, &c. 4 Eng. L. & Eq. 265.

⁶ *Johnson v. Atlantic*, &c. 35 N. H. 569.

⁷ *White v. South*, &c. 6 Cush. 412.

⁸ *Lehigh*, &c. v. *Trone*, 23 Penn. 206.

⁹ *Tinsman v. Belvidere*, &c. 2 Dutch 148.

is liable for injury to meadows in consequence of insufficient culverts.¹ And an action at law, and not an application to the county commissioners, under Rev. Sts. c. 39, § 56, is the proper remedy, to recover damages of a railroad corporation, for filling up the bed of a natural watercourse with their embankment, and thereby flowing the land of a riparian proprietor above, which is not adjoining the railroad, it not appearing that such filling up was necessary for the construction of the road, or that a sufficient new canal could not be made.²

§ 19. But commissioners cannot allow damages for injury to a mill upon another lot of the same person whose land is taken.³ And, if property is overflowed through the defective construction of a railroad, the owner cannot recover for damages which he might have prevented by reasonable care, skill, and diligence.⁴

§ 20. The owner of a well, upon land adjoining a railroad, may recover for the subtraction of water therefrom by the construction of the road, under a statute giving all parties who suffer damage by such cause a claim for damages.⁵

§ 21. A railroad corporation is a *common carrier*.⁶ And in England, by express statute, railroads are placed on the same footing, as to rights and liabilities, with other common carriers of passengers. But a railroad may pass a by-law, excluding merchandise from the passenger-trains, and limiting it to the freight-trains.⁷ And a railroad, unless bound by the express terms of its charter, may refuse to carry particular goods offered.⁸

§ 22. As in the case of other common carriers, the question has often arisen, how far a railroad may modify its general liability by express notice.

§ 23. The defendants, a railroad company, let their tracks to the plaintiff for the transportation of horses by engines, along their road, with notice that the charge was for the carriages and power only; that the plaintiff was to see to the efficiency of the carriages, and they would not be responsible for any defect in the carriages, unless complaint was made at the time of booking, or before leaving the station, nor for any damages, however caused,

¹ Johnson v. Atlantic, &c. N. H. June, 1857, Law Rep.; Redfield, 154, n.

² Estabrooks v. Peterborough, &c. 12 Cush. 224.

³ Canandaigua, &c. v. Payne, 16 Barb. 373.

⁴ Chase v. New York, &c. 24 Barb. 273.

⁵ Parker v. Boston, &c. 3 Cush. 107.

⁶ Parker v. Great, &c. 7 Man. & G. 253; Story, Bailm. § 500. See 23 Cal. 323.

⁷ Merihew v. Milwaukee, &c. 5 Law Reg.

⁸ 364.

⁹ Johnson v. Midland, &c. 4 Exch. 367.

to horses, &c. The plaintiff's horses being injured in consequence of the breaking of an axletree, caused by the defendants' negligence; held, they were not liable.¹ So the consignee of a block of marble requested the company, A, by which it was transported, to allow the car containing it to be removed to the depot of another road, B; aided in such removal, and procured the use of the machinery of B to unload the block. The block being broken through defect of the machinery; held, company A was not liable.² So the plaintiff employed the defendants, a railroad, to transport his cattle. He saw them put in the carriages, and signed a ticket as follows: "The owner undertaking all risks of conveyance whatever." Held, the defendants were not impliedly liable, on account of unfitness of the carriage for the purpose in question.³

§ 24. But, on the other hand, it is said: "From this duty" (ordinary care) "they cannot discharge themselves, even by a special agreement. Such a stipulation would be void, being against the policy of the law. Whatever has an obvious tendency to encourage guilty negligence, fraud, or crime is contrary to public policy."⁴ Thus a railroad is liable for loss of animals by negligence, notwithstanding a written notice, disclaiming such liability.⁵ So a railroad is liable for want of ordinary care and skill in unloading goods, though its rules, known to the consignee, provide that the consignee shall unlade within a certain time from arrival, and the consignee had notice more than that length of time prior to the unloading by the company.⁶ So the defendants, a railroad company, gave notice, of which the plaintiff had knowledge, that all goods in their warehouse would be at the owner's risk. Held, they were still liable for a loss of the plaintiff's goods, delivered at their station-house for transportation, by accidental fire.⁷ So a railroad company were authorized by statute to pass by-laws, which were to be painted upon a board and hung up at the stations, and to be binding upon all parties. They made a by-law, limiting the

¹ *Austin v. Manchester*, &c. 11 Eng. L. & Eq. 506. And see *Lee v. Marsh*, 43 Barb. 102; *Thayer v. St. Louis*, &c. 22 Ind. 26.

² *Lewis v. Western*, &c. 11 Met. 509.

³ *Chippendale v. Lancashire*, &c. 7 Eng. L. & Eq. 395; acc. *Curr v. Same*, 14 Ib. 340; *M'Manus v. Same*, 30 Law Times, 321. But see *Hearn v. The London*, &c. 29 Eng. L. & Eq. 494.

⁴ Per *Rogers, J.*, *Camden*, &c. v. *Baldauf*, 16 Penn. 67; acc. *Penn. &c. v. M'Closkey*, 23 Ib. 526.

⁵ *Sager v. Portsmouth*, &c. 31 Maine, 228.

⁶ *Kimball v. Western*, &c. 6 Gray, 542. See *De Mott v. Laraway*, 14 Wend. 225.

⁷ *Moses v. Boston*, &c. 4 Fost. 71.

amount of a passenger's baggage, and providing that the company would not be responsible for the care of baggage, unless booked and paid for accordingly. Held, the company were liable for baggage delivered to their servants, and stolen; unless they proved that the by-law was thus hung up, or actually known to the passenger.¹

§ 25. The questions, whether a railroad is bound actually to deliver goods transported by it, or what acts will constitute constructive delivery; at what point its liability in this respect ceases; and whether and by what means it ceases to be a common carrier and becomes a mere warehouse-man, with responsibilities much restricted; have given rise to somewhat conflicting opinions and decisions. As the general result of the cases, a late elementary writer² remarks; "the liability of the railroad as a common carrier continues, till the owner has had reasonable time and opportunity, depending of course on express or implied notice of their arrival, to take and remove them." Where goods are stolen from the depot, as matter of law, the company are not responsible.³ So it is held, that the company is not liable for goods taken by mistake, and without the company's fault, from the warehouse. Otherwise, if wrongly delivered by mistake of the company's servants. And the burden of proof is on the company.⁴ So the liability does not cease, till some open and distinct act of deposit in the warehouse. Thus, if the storage is made on a car, this must be separated from the train and left in the usual place. It is not enough to throw the goods down on a platform or in a station-house.⁵

§ 26. But, on the other hand, the plaintiff, having intrusted goods to the servants of the defendants, a railroad company, without the knowledge of the company, took away a part of them. Held, the company were liable only as depositaries, and the burden of proof was upon the plaintiff, to show how many goods were taken and how many left.⁶

§ 27. In a late case in Massachusetts, the distinctions upon the general subject have been thus accurately defined. The rule, that goods must be actually delivered, "applies very properly to the

¹ *Grant Western, &c. v. Goodman*, 11 70. See *Smith v. Nashua, &c.* 7 *Fost. Eng. L. & Eq.* 546. 86.

² *Redfield on Railways*, § 130.

³ *Lamb v. Western, &c.* 7 *Allen*, 98.

⁴ *Lichtenhein v. Boston, &c.* 11 *Cush.*

⁵ *Chicago, &c. v. Warren*, 16 *Ill.* 502.

⁶ *Spade v. Hudson, &c.* 16 *Barb.* 383.

case of goods carried by wagons, and other vehicles traversing the common highways and streets, and which, therefore, can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea in this respect, that from the very nature of the case the merchandise can only be transported along one line and delivered at its termination, or at some fixed place by its side at some intermediate point." The duty assumed by the railroad is, "that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or the party entitled to receive them, if he is then and there ready to take them forthwith, or if the consignee is not then ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. From this view, there result two distinct liabilities: first, that of common carriers, and afterwards, that of keepers for hire."¹

§ 28. The collateral question has often arisen, whether a railroad corporation is responsible as a carrier for property delivered to it for transportation beyond the line of its own road, or merely for safe storage and delivery to the succeeding company or other carrier. Of course the liability in this respect must somewhat depend upon usage, and upon the terms of the receipt, if any, constituting the contract of the corporation, or of the public notice upon the subject, issued by it. But, independently of these considerations, there is great conflict of authorities upon the subject; the English cases generally extending the liability of the corporation to the entire route over which the goods are to be carried; while the weight of American authority is in favor of the more restricted rule of responsibility.² (a)

¹ Per Shaw, C. J., *Norway, &c., v. Boston, &c.* 1 Gray, 263.

² *Hodges on Railways*, 615; *Scotthorn v. South, &c.* 18 Eng. L. & Eq. 553; *Wilson v. York, &c.* Ib. 557 n.; *Muschamp v. Lancaster, &c.* 8 M. & W. 421; *Nutting v. Connecticut, &c.* 1 Gray, 502; *Hood v. New York, &c.* 22 Conn. 1; *Weed v. Sara-*

toga, &c. 19 Wend. 534; *Kyle v. Laurens, &c.* 10 Rich. Law, 382. See, as to *tickets*, *Vedder v. Fellows*, 20 N. Y. (6 Smith) 126; *Nellis v. N. Y. &c.* 30 N. Y. (3 Tiff.) 505. A railroad is responsible for the safety of a passenger, without reference to the *kind of car* or *payment of fare*. *Ohio, &c. v. Muhling*, 30 Ill. 9.

(a) As to the further question of the power of a railroad corporation, whose charter of course confines its operations within the limits of its own route, even by express contract to incur any more ex-

tended liability; see *Noyes v. Rutland, &c.* 1 Wms. 110; *Bradford v. South Carolina, &c.* 7 Rich. Law, 201; *Wibert v. New York, &c.* 2 Kern. 245; *Collins v. The Bristol, &c.* 36 Eng. L. & Eq. 482; *Elmore*

§ 29. Where timber carried by A arrives at the station of B, which is its destination, but B refuses to deliver it to the owner, though he tenders the charges, on the ground that B's contract with A to deliver goods for them does not include timber; and notifies him that it shall require the timber to be taken back upon the road of A: B is liable in trover.¹

§ 29 a. If an arrangement or course of business exists between two railroad companies, A and B, whose roads are upon the same general route, but do not actually connect with each other, by which goods, which have been carried to the termination of A, and are destined to some point upon or beyond the line of B, are delivered to B with a bill of the expenses already incurred, from which, if found to be correct, a way-bill is made out; B is only responsible as warehousemen, and not as common carriers, for goods so received and stored by B, until the delivery of the bill of expenses.²

§ 29 b. A box of goods, marked and directed to the plaintiff at Boston, was delivered by his agent, at Saratoga Springs, to the defendants. They gave a receipt in these words: "Received, Saratoga Springs, September 17, 1855, from B., in apparent good order, one Box, to forward to Castleton for B., Boston, Mass., at freight of — per 100 lbs weight." Castleton was the terminus of their road toward Boston, and, with the Rutland and Washington Railroad with which it connected at Castleton, and other roads, a line of railroad communication was formed between Saratoga Springs and Boston. Held, the defendants were only liable for the safe delivery at the end of their own road in Castleton, and it was their duty there to deliver over to the railroad forming the next link in the line to Boston; and it was sufficient to establish, *prima facie*, a right of recovery, to show its delivery to them, and that it had not arrived at Boston, and was lost.³

§ 30. Public safety and convenience, and a due regard to their own interest, imperatively demand from railroad corporations the adoption of precise and strict rules in reference to *passengers*; and numerous cases have arisen, growing out of an alleged viola-

¹ *Rooke v. Midland, &c.* 14 Eng. L. & Eq. 175.

² *Brintnall v. S. & W. &c.* 32 Verm. 665.

³ *Judson v. Western, &c.* 4 Allen, 520.

v. Naugatuck, &c. 23 Conn. 457; *Foy v. Great, &c.* 29 Ib. 354; *Moore v. Michigan, &c.* 3 Mich. 23; *Naugatuck, &c. v. Waterbury, &c.* 24 Conn. 468.

tion of them, and the action of the company or its agents in reference to such violation.

§ 30 *a*. Frequent questions arise, in regard to the liability for *baggage*.

§ 30 *b*. What constitutes baggage, is a question for the jury, under the circumstances of the case, and in consideration of the use, quality, value, and kind of the articles. As in case of beds and bedding of a poor man, moving with his family, which are packed in his box or trunk, with clothing.¹

§ 30 *c*. The ticket of a passenger includes the ordinary baggage required for his personal accommodation upon the journey, but not merchandise. Unless such merchandise is paid for, or, by usage or contract, is made baggage, the company do not insure it. And it is not legal evidence of such liability, that other passengers, on other occasions, had taken with them in the passenger cars similar merchandise, without further proof that it was knowingly carried as baggage, and paid for by the ticket. The company are liable, however, for gross negligence, as a bailee without reward. Such negligence must be proved, and is not to be inferred from the loss.²

§ 30 *d*. A passenger, arriving with baggage at a station, may legally consider one who handles and takes charge of the baggage upon arrival of the train, as an agent of the road; and notice to such person, while handling the baggage, of its destination, binds the company. Where baggage has reached its final destination, the company are bound to have it ready, upon arrival, for delivery, upon the platform used for this purpose, until the owner can, in the use of due diligence, call for and receive it; which he must do in reasonable time. If he does not, the company must place it in their baggage-room and keep it for him, as warehousemen. The reasonable time is immediately, making due allowance for the crowd on the platform, and this however late the hour, if it is placed on the platform and for delivery. Where passengers arrive late at night, and stop for a few hours, and it is the usage of the company, upon notice that it is going on in the morning by the next train over a connecting road, to put it in the room, and keep it for delivery in the morning to such road, when called for by the owner, and requested to do so; the company continue to be

¹ *Orinut v. Henshaw*, 35 Verm. 605.
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² *Smith v. Boston, &c.* 44 N. H. 325.

carriers, and are not warehousemen. And such usage is a consideration of great importance.¹

§ 80 *e*. Where the ticket to a connecting road stipulates, that, in selling, the company act only as agent for roads beyond the terminus of their own road, and assume no responsibility therefor; they are not liable for baggage lost elsewhere than upon their road.² But if several companies, whose lines connect into the British Provinces, have arranged together for an excursion train, and the company at the Massachusetts end of the route issues tickets, with coupons attached, for the whole distance, and its agent refuses to give a check for the luggage of a purchaser of such ticket, saying that "it would be perfectly safe, as he was to go through with them," and it is accordingly put into a baggage-car of the company, which is sent through in charge of its agent; the company is liable for a loss upon any part of the route.³

§ 80 *f*. In regard to the personal safety of passengers, the rule is laid down, that the utmost care is demanded from the company.⁴

§ 80 *g*. A passenger upon a railroad may recover for injuries, though by request of the superintendent he was acting as brakeman.⁵ But a railroad corporation, exercising reasonable care in providing and using suitable locomotive engines and tenders on their roads, are not liable for an injury occasioned by a defect therein to a workman employed by them, while being carried over their road without paying fare.⁶

§ 81. A rule, that passengers shall go through in the same train, or else pay fare for the remainder of the route, is valid, and binds a passenger, though not informed of it, till after entering the car.⁷

§ 82. If a railroad establish and give notice of a discrimination between the amounts of fare paid at the station and in the car; a passenger, who refuses to pay the additional sum in the car, may be ejected by the conductor, using no unnecessary force.⁸ And it has been held that the same rule applies, although the plaintiff went to the ticket-office, a reasonable time before the train left, to procure a ticket; but the office was closed, and so continued till

¹ *Onimut v. Henshaw*, 35 Verm. 605.

² *Pennsylvania, &c. v. Schwarzenberger*, 45 Penn. 208.

³ *Najac v. Boston*, &c. 7 Allen, 329.

⁴ *Thayer v. St. Louis*, &c. 22 Ind. 26.

⁵ *Chamberlain v. Milwaukie*, &c. 11 Wis.

238.

⁶ *Seaver v. Boston*, &c. 14 Gray, 466.

⁷ *Cheney v. Boston*, &c. 11 Met. 121.

⁸ *Hilliard v. Goold*, 34 N. H. 230.

the train left, of which the passenger informed the conductor before his expulsion.¹

§ 33. If a passenger refuse to surrender his ticket in exchange for a check, according to the rules of the road, and without such surrender leave the car; he is liable for the fare for the distance travelled by him; or, upon his refusal to surrender his ticket or pay the fare, the conductor may eject him.² See § 35.

§ 34. The plaintiff, being informed by the station clerk that he might return at a certain hour on an excursion-ticket, purchased the ticket and took the train, but the train did not pass through, and, at the stopping-place, the clerk demanded further fare, saying that the plaintiff should not have taken that train; and, upon his refusal to pay, the superintendent took him into custody. The plaintiff's attorney wrote to the secretary of the company for compensation, and the secretary requested to know the date, and promised to make inquiry. He also verbally remarked, that it was an awkward business, and the blame would fall upon the clerk, who misled the plaintiff; and offered to return the additional fare. Held, the company were not liable for the arrest.³

§ 35. A railroad conductor has a right, using no unnecessary force, to eject from the cars, before reaching the station to which he has purchased his ticket, a passenger, who has during the passage conducted himself in a disorderly manner to the disturbance of other passengers; and he may show, in justification of the expulsion, acts of the passenger during the entire passage, it being a short one, and is not restricted to acts committed in the last three miles before the ejection. In such a case, evidence of the general character of the passenger for sobriety cannot be received. So the conductor has a right to eject a passenger who refuses to pay his fare, or to give up his ticket, on being requested by the conductor to do so, in accordance with the reasonable regulations of the road; and, in a trial of the conductor for assault and battery, by reason of such ejection, the conductor may prove such regulations.⁴ See § 33.

§ 36. If a railroad company give reasonable published notice, and reasonable verbal notice in the train, of the necessity of

¹ Crocker v. New London, &c. 24 Conn. 249.

² Northern, &c. v. Page, 22 Barb. 130.

³ Roe v. Birkenhead, &c. 7 Eng. L. & Eq. 546. See 2 Eng. L. & Eq. 406.

⁴ People v. Caryl, 3 Parker (N. Y.), 326; Ohio, &c. v. Muhling, 30 Ill. 9.

changing cars, and a passenger by his own carelessness neglects to change cars, the fault is his own, and the company is not liable; and if, after starting from the station in a wrong direction, the error is discovered in time for him to go back to the station, and start thence without delay for the place to which he had purchased a ticket, and the company offer him the privilege of going free of charge, and he refuses to return, or to leave the cars, or to pay for the route he is travelling; he may lawfully be ejected from the train.¹

§ 37. But, on the other hand, railroad companies have often been held liable to damages in cases of this description. Thus the plaintiff was put off the cars for refusal to pay the fare, though he offered a ticket, dated a few days previously, but marked "good for this trip only," and not mutilated, as was the custom with tickets which had been used. Held, the words in question meant only *one continuous trip*, but not a trip on a particular day, and that the plaintiff had a right of action.² So, if a passenger is wrongfully ejected, and in attempting to re-enter the car is injured; he is entitled to damages, unless guilty of some negligence which contributed to such injury.³ And a conductor is responsible for any excess, or improper kind, of force, even in the lawful expulsion of a passenger.⁴ And more especially, it seems, if the expulsion is unlawful.⁵

§ 38. It is held, in Illinois, that a passenger refusing to pay his fare on a railroad train may be ejected at any usual stopping-place, but not elsewhere.⁶ And, in Vermont,⁷ the same rule is established by statute. And trustees, in charge of the Vermont and Canada Railroad, are subject to this provision.⁸ So where an attempt is made to eject a passenger from a car *in motion*, he has the same right of resistance as in case of a direct attempt upon his life.⁹ And such resistance does not render him chargeable with *concurrent negligence*, and thus bar an action against the railroad.¹⁰ But in New York, where a statute provided, that "if any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put

¹ Page v. New York, &c. 6 Duer, 523.

² Pier v. Finch, 24 Barb. 514.

³ Crocker v. New London, &c. 24 Conn. 249.

⁴ Hilliard v. Goold, 34 N. H. 230; State v. Ross, 2 Dutch. 224.

⁵ Law Reg. Nov. 1861, p. 59.

⁶ Chicago, &c. v. Parks 18 Ill. 450.

⁷ Comp. Stats. 202.

⁸ Stephen v. Smith, 3 Wms. 160.

⁹ Sanford v. The 8th Av. &c. (N. Y.)

Law Reg. Nov. 1861, p. 58.

¹⁰ Ibid.

him and his baggage out of the cars, using no unnecessary force, at any usual stopping-place or near any dwelling-house, as the conductor shall elect, on stopping the train ;" held, under this statute, when a train had been stopped for the purpose of putting out a passenger who refused to pay his fare, the right of the conductor to put him out was not taken away by his then offering to pay the fare.¹

§ 39. A by-law provided, that each passenger should receive a ticket, to be delivered up before leaving the premises of the company, and, in default of compliance with these requisitions, pay fare from the original starting-place. A passenger being arrested for a breach of this by-law, held, it was not a by-law *imposing a penalty*, but merely imposed the liability specified as to fare ; and therefore the arrest was illegal.² So a by-law provided a penalty for entering a carriage without first paying the fare. The fare to A was 7s., but to B., a more remote point, on account of competition, only 5s. The defendant, intending to go to A, bought a ticket for B, and offered to surrender it at A, but refused to pay the additional 2s. Held, he was not liable to the penalty.³

§ 40. A railroad is liable for damages caused by any breach of duty in regard to the *time* of running its trains. Thus the defendants, a railroad company, continued to advertise on their time-tables, that a train would leave a station at 7.20, and arrive at another place beyond their line at 12, after this connecting train was discontinued. Held, a party who was thereby delayed and injured in his business might maintain an action.⁴ So where the plaintiff bought an excursion-ticket, but found no return-train on the day for which it was advertised ; held, he might recover the expense of returning by express.⁵ But where the plaintiff, a miller, sent by the road of the defendants a shaft, as a model for casting a new one ; and in consequence of delay in carrying it, his mill was kept idle, but the defendants had no notice of the facts : held, the plaintiff was not entitled to special damages.⁶

§ 41. A passenger may maintain an action for an injury, though riding upon a free ticket.⁷

¹ *People v. Jillson*, 3 Parker (N. S.), 234.

² *Chilton v. London, &c.* 5 Railway Cas. 3.

³ *Reg. v. Frere*, 29 Eng. L. & Eq. 143.

⁴ *Denton v. Great Northern, &c.* 34 Eng. L. & Eq. 154. But see *Hamlin v. Great Northern, &c.* 38 Eng. L. & Eq. 335.

⁵ *Hawcroft v. Great Northern, &c.* 8 Eng. L. & Eq. 362.

⁶ *Blake v. Midland, &c.* 10 Eng. L. & Eq. 437. See *Alder & Keighley*, 15 M. & W. 117.

⁷ *Great, &c. r. Harrison*, 26 Eng. L. & Eq. 443 ; *Gillenwater v. Madison, &c.* 5 Ind. 339 ; *Nolton v. Western, &c.* 15 N. Y. 444 ; *Philadelphia, &c. v. Derby*, 14 How. 468, 483. See *Steamboat, &c. v. King* 16 How. 469.

§ 42. Upon the principle *in pari delicto* (see chap. 4), no action lies for an injury caused by the plaintiff's own fault or neglect.¹ Or where his negligence "contributed to the cause of the accident."² (See § 38.) Thus no action lies, for killing the slave of the plaintiff while asleep upon the track.³ So a passenger cannot maintain an action, who, contrary to the published rules, or more especially to express notice from the conductor at the time, keeps his hand out of a window, while passing a bridge, and is injured in consequence.⁴ So the arm of a passenger, who was at a window, was broken by something coming in contact with the car, in passing stationary cars of the company on another track. Held, the burden was on the plaintiff to prove negligence.⁵ And where, in an action by a passenger for an injury from the swinging of an unfastened door of another car standing upon a parallel track, the plaintiff's own testimony showed, that his elbow extended through an open window, beyond the place where the sash would have been, had the window been shut; held, as matter of law, the plaintiff could not recover, and it was not a case for the jury.⁶ So, at the intersection of a railroad and highway, there are concurrent rights. A traveller on the latter cannot recover for injury caused by collision, unless he look out for approaching trains.⁷ So where one about to cross a track is obliged to come near it, in order to ascertain whether a train is approaching; he is peculiarly bound to ascertain this fact. If, seeing a train approach, he determines to try the speed of his horses against that of the engine; he does it at his peril. Or, if he heedlessly drives upon the track, without determining by observation whether he can safely do so.⁸ So where a team was frightened by the moving of a locomotive, ran away, and the driver, in trying to stop it, was thrown under the wheel of the wagon, and had his leg broken; held, if the accident was caused by the company's negligence alone, and in no part by the negligence of the driver, he might recover; but proof of the omission to ring the bell or whistle, or of an excessive rate of speed, was not held sufficient, without proof that the accident was occa-

¹ See 41 Barb. 375; *The Indianapolis, &c. v. Wright*, 22 Ind. 376.

² *Clark v. Eighth, &c.* 32 Barb. 657.

³ *Richardson v. Railroad Co.* 8 Rich. 190.

⁴ *Laing v. Colder*, 8 Barr. 479.

⁵ *Holbrook v. Utica, &c.* 2 Kern. 236

See *Gillenwater v. Madison, &c.* 5 Ind. 339; *Hegeman v. Western, &c.* 16 Barb. 353.

⁶ *Todd v. Old, &c.* 7 Allen, 207.

⁷ *North, &c. v. Heilman*, 49 Penn. 60.

⁸ *Wilds v. The Hudson, &c.* 29 N. Y. (2 Tiff.) 315.

sioned thereby.¹ So the presumption is against a cartman who drives his cart by the side of a car; the latter being confined by its track.² So a deaf person is guilty of negligence in driving an unmanageable horse across the track, when a train is approaching. It is no excuse that the horse rushed upon the track near a crossing, or was driven there to avoid the engine.³ (a)

§ 43. But, in case of gross negligence, the railroad is not excused by a provision on the ticket, that the passenger "assumes all risk."⁴ So, if passenger-cars run upon a road so narrow as to endanger the limbs of passengers while resting in the windows; the company is bound to provide wire-gauze, bars, slats, or other barricades, to prevent passengers from putting out their arms.⁵ So an action may be maintained, though the party was injured while crossing the track, to see whether a train was coming; more especially where it is done at the suggestion of the station agent. The question of negligence is for the jury. A person so coming is a *passenger*, and the company are held to the utmost care and diligence.⁶ So it is not a correct instruction, that if one killed upon a railroad knew that the *fast line* was approaching, and knew his danger in time to escape, the company were not liable. The instruction should be, that he was to be charged with knowledge or regarded as knowing, if he had such warnings or opportunities of knowledge as would; with ordinary caution in those circumstances, have saved him.⁷ So the fact that no one, without some previous knowledge, can be expected to provide against the contingency of a car, with the railway upon which it stands, coming upon him by a side movement, imposes upon a railroad company extraordinary care and circumspection in moving their cars from one track to another in that unusual manner.⁸ The fact also, in

¹ Pittsburgh, &c. v. Karns, 13 Ind. 87.

² Suydam v. Grand, &c. 41 Barb. 375.

³ Illinois, &c. v. Buckner, 28 Ill. 299.

⁴ Indiana, &c. v. Mundy, 21 Ind. 48.

⁵ N. Jersey, &c. v. Kennard, 21 Penn. 203.

⁶ Warren v. Fitchburg, &c. 8 Allen, 227.

⁷ Pennsylvania, &c. v. Henderson, 43 Penn. 449.

⁸ Gordon v. Railroad, 40 Barb. 546.

(a) The fourth section of the Rhode Isl- and "act in relation to railroads" (Dig. 1844, pp. 338, 339), giving an action to any one injured, by the neglect of a railroad company to ring the bell upon their locomotive engine, for the distance, at least, of eighty rods from the place where the railroad crosses any turnpike, highway, or public way, upon the same level with the railroad, and to keep the same ringing until the engine shall have crossed such turnpike

or road; was exclusively designed for the benefit of persons crossing the turnpike, &c., on a level with the railroad. Therefore a person injured by the engine, whilst he is walking along the track of the railroad and not at any crossing, cannot recover damages against the railroad for such injury, upon the ground that it was caused by their neglect to ring the bell. O'Donnell v. Providence, &c. 6 R. I. 211.

the absence of all proof of knowledge, by a person injured, of such structure, and the danger resulting to passengers therefrom, will exonerate him from the charge of having contributed to the accident by his own carelessness.¹ So a female passenger was ordered by an officer of the train, while the cars were in motion, on a dark and rainy night, to pass forward, and, in stepping to another car, fell between the cars, and was instantly killed. Held, there was not sufficient proof of negligence in the passenger to take the case from the jury; but the question of the defendant's negligence was for them.² So where a horse-car was crowded inside; and the plaintiff stood on the front platform, there paid his fare to the conductor, who did not object to his being there, and, when the car which struck the plaintiff was seen approaching, he exerted himself to get in as safe a position as he could: held, that he was not guilty of negligence, on general principles, or in view of the statute about riding on platforms.³ So a boy, ten years old, wrongfully got upon a street railway car while in motion, without the intention or means of paying fare, and was wrongfully allowed to remain there, but afterwards the driver, while driving so fast as to make it dangerous, ordered him to jump off. In doing so, with reasonable care, the boy was injured. Held, the company was liable.⁴ (And in the same case it was held, that allowing a boy of that age to be in the street, with other boys, after dark, is not *per se* and as matter of law *negligence*.⁵) So the plaintiff, a passenger upon a city railroad car, indicated his wish to alight at the place where the car was then stopping, by requesting the driver to keep on the brake; who replied, "Yes, sir," but immediately turned the brake and started the car, whereby the plaintiff, who was in the act of alighting, was thrown into the street and injured. Held, although the request was made to the driver, not the conductor, and though the plaintiff attempted to alight from the front platform, the jury had a right to find a verdict in his favor, and the defendants could not claim a nonsuit; the plaintiff having got on at the front without objection, and no notice being proved against alighting at the front.⁶

§ 44. The company is liable for injury sustained in escaping

¹ Gordon v. Railroad, 40 Barb. 546.

⁴ Lovett v. Salem, &c. 9 Allen, 557.

² McIntyre v. New York, &c. 43 Barb. 552.

⁵ Ibid.

³ Clark v. Eighth, &c. 32 Barb. 657.

⁶ Mulhady v. Brooklyn, &c. 30 N. Y. (3 Tiff.) 370.

from a danger caused by its negligence; as where a passenger leaps from the car under a reasonable fear of an impending fatal collision.¹ Otherwise, if he leap from the car because the train is passing the station where he desires to stop, and after the conductor has announced it, and though the conductor and brakeman promise to stop and back the train.² And, in general, where the train passes its regular station, and a passenger, who intended to stop there, leaps from the car in motion; he cannot recover.³

§ 44 a. We shall presently consider the subject of *injuries to animals*. The same point may be briefly noticed, in connection with the inquiry, how far the plaintiff's own fault affects his right of action for an injury caused by a railroad.

§ 44 b. In general, where an animal is killed upon a railroad through fault of the owner, the company will be liable only for *gross negligence*, which implies wilful injury.⁴ And it is held, that for the owner to allow his cattle to run in a field next the railroad, without the fence which it was his duty to erect, is such gross negligence, as to prevent his recovering their value if killed, no matter what may be the negligence of the railroad.⁵ Thus a railroad is not liable if a cow, feeding in an adjacent pasture, escapes through a defect in the fence, and is run over and killed, without proof of due care on the part of the owner to prevent such an escape.⁶ So where bars are erected in the line of a fence, at the instance and for the accommodation of the land-owner, and he neglects to keep them up. Nor, in such case, can another owner of animals, which stray through the fence upon the track, recover of the company.⁷

§ 44 c. But, as already suggested, a railroad will be held liable for accidents of this nature, in case of gross or wanton negligence.⁸ Thus, though the cattle killed are trespassers on the road, yet they are responsible, if the killing be by their neglecting to stop the train or blow the whistle, when there was confessedly oppor-

¹ Railroad Co. v. Aspell, 23 Penn. 147.

² Ibid.

³ Damont v. New Orleans, &c. 9 Louis.

Ann. 441.

⁴ Illinois, &c. v. Goodwin, 30 Ill. 117; Same v. Phelps, 29 ib. 447; Toledo, &c. v. Thomas, 18 Ind. 215; 22 Ind. 26; Chicago, &c. v. Cauffman, 23 Ill. 513; Ohio, &c. v. Meisenheimer, 27 Ill. 30; Ohio, &c. v. Jones, ib. 41.

⁵ Stucke v. Milwaukee, &c. 9 Wis. 202.

⁶ Stearns v. Old Colony, &c. 1 Allen,

493.

⁷ Indianapolis, &c. v. Adkins, 23 Ind.

340; Acc. Indianapolis, &c. v. Shimer, 17

Ind. 295.

⁸ Pritchard v. La Crosse, &c. 7 Wis.

232; Thayer v. St. Louis, &c. 22 Ind.

26.

tunity for doing both; the plaintiff not being guilty of gross negligence.¹ So where cattle are at large without the fault of the owner, and go upon the track of a railroad, and are there killed through the negligence of the company in the management of their train; the owner may recover damages, though the cattle were trespassers on the railroad, this being not actual negligence, but a mere technical wrong.² So a railroad, bound to fence, is liable, if a horse, feeding in an adjacent pasture, escapes through a defect in the fence, and is run over and killed by the cars, without proof of any care on the part of the owner to prevent such escape. And evidence of notice to the owner, that the horse had escaped two or three times before, and been upon the track, is immaterial.³ So the plaintiff had driven his cows home after dark in the evening and left them in the highway in front of his house, intending to milk them there, and then put them into his enclosure, and while they were so left went into his house for a short time. While he was gone, they strayed away, and he searched for them until eleven o'clock. About ten, they were run over by the defendants' cars. The railroad was about a mile from the plaintiff's house, and he had not searched in that direction. The suffering of cattle to run at large was forbidden by statute. The judge charged the jury, that, if the plaintiff left them there, intending to milk them within a reasonable time, and then to put them into his enclosure, and exercised ordinary care for the purpose of keeping them, he had not suffered them to go at large, and was not guilty of such negligence as would prevent his recovery. Held, on motion for a new trial, the question of negligence was properly one of fact for the jury, but that, so far as it could be treated as involving any legal question, the law was properly stated.⁴

§ 45. A railroad is not liable for *injury to animals* improperly upon the track, unless, after discovering them, the injury might by reasonable care have been prevented. (a) As where an animal escapes into the highway, and thence upon the track; or where an

¹ *Stucke v. Milwaukee*, &c. 9 Wis. 202.

² *Isbell v. New York*, &c. 27 Conn. 393.

³ *Rogers v. Newburyport*, &c. 1 Allen, 16; *Munch v. N. Y.* &c. 29 Barb. 647.

⁴ *Bulkley v. New York*, &c. 27 Conn. 479.

(a) In case of the killing of animals at a crossing, it is very truly suggested, that the owner of the animals would himself be liable for injury to passengers. *Chicago, &c. v. Cauffman*, 28 Ill. 513.

animal, trespassing upon private property, strays upon the track through defect of a fence, which, *as to the owner of the land*, the company is bound to maintain. But it is otherwise in case of injury to cattle, if, as between the owner of such cattle and the company, the latter is bound to maintain the fence. But the company is not liable, if the owner of the cattle has contracted to maintain the fence, or is otherwise bound to maintain it, and has failed to do so.¹ (a)

¹ Redfield on Railways, 361, c. 20; Hal-loran v. New York, &c. 2 E. D. Smith, 257. See Indianapolis, &c. v. Elliott, 20 Ind. 450; Thayer v. St. Louis, &c. 22 Ind. 26; McKinney v. The Ohio, &c. 22 Ind. 99; Indianapolis, &c. v. Leaman, 18 Ind. 173; Indianapolis, &c. v. Renner, 17 Ind. 135; Crisman v. Masters, 23 Ind. 319; Indianap-

olis, &c. v. Adkins, 23 Ind. 340; Indian-apolis, &c. v. Townsend, 10 Ind. 38; Jef-fersonville, &c. v. Applegate, Ib. 49; In-dianapolis, &c. v. Meek, Ib. 502; Jefferson-ville, &c. v. Dougherty, Ib. 549. See Scaggs v. Baltimore, &c. 10 Md. 268; In-diana, &c. v. Gapen, 10 Ind. 292.

(a) Such a fence as a good husbandman generally keeps, is the standard sometimes adopted. Toledo, &c. v. Thomas, 18 Ind. 215.

It is sometimes held gross negligence to allow cattle to go at large near a railroad. Talmadge v. Rensselaer, &c. 13 Barb. 493, 497; Louisville, &c. v. Milton, 14 B. Mon. 75; Railroad Co. v. Skinner, 19 Penn. 298. But see Housatonic, &c. v. Water-bury, 23 Conn. 101; Lafayette, &c. v. Shriner, 6 Ind. 141; Fawcett v. York, &c. 2 Eng. L. & Eq. 289; Trow v. Vermont, &c. 487.

If the owner of an adjoining lot covenant with the company to erect and maintain the necessary fences, and fail to do so, in consequence of which his cattle are injured, neither he nor his lessee, although the latter may not be bound by the covenant, can claim damages of the corporation for injury to his cattle through such failure. Duffy v. New York, &c. 2 Hilt. 496.

A railroad company took land of A for its track, and, by award, paid \$500; \$200 as the value of the land, \$300 for the building and keeping in repair by A of the fences along the line of the track and his remaining land. Held, the railroad was not liable to him for damages for the killing of a horse by the cars, when such horse had leaped over his fences. Terre Haute, &c. v. Smith, 16 Ind. 102. But see New, &c. v. Maiden, 12 Ind. 10.

The defendants, a railroad company, took from A a conveyance of a right of way for certain distances on the east and west sides of the track, with a covenant for a fence on each side, and a reservation of the right of passage, not to interfere with the trains. A conveyed the land to B, unconditionally, and B leased to the plaintiff.

No fence having been made, a horse of the plaintiff was killed upon the track, where it crossed the land. Held, the plaintiff was estopped from maintaining an action. Easter v. The Little, &c. 14 Ohio St. 48.

A railroad is not liable for injury to animals upon the road, in case of omission to ring or whistle, unless it could have been effectual. Illinois, &c. v. Phelps, 29 Ill. 447.

It is negligence to permit vegetation to grow upon the road so as to conceal cattle. Bass v. Chicago, &c. 28 Ill. 9.

If a railroad builds cattle-guards within the limits of a street in a village, it must keep them in repair. And in an action against a railroad for running over a mare, it appeared that the bell was not rung, and that the cattle-guard was out of repair. The road was held liable. Chicago, &c. v. Reid, 24 Ill. 144.

In case of injury to cattle, the rate of speed is a question for the jury. Central, &c. v. Lawrence, 13 Ohio St. 66.

Where a train was running at a greater than usual speed, upon a straight part of the road, in the daytime, and one of several cattle, feeding near, and crossing the road, was killed by the locomotive; held to be negligence, that the speed of the train was not lessened, nor the usual mode of driving off stock by the blowing of a steam-whistle resorted to. Aycock v. Railroad Co. 6 Jones, 231.

Otherwise, where a beast would not be driven off from the track by a person trying to do so, and could not be scared off by the steam-whistle, the engineer striving with all his might to arrest the progress of the train before reaching it. Montgomery v. Wilmington, &c. 6 Jones, 464.

It is the duty and right of a railroad

§ 46. If a horse takes fright at the noise of a train, not caused

company to carry a head-light to prevent collisions, even though it necessarily prevents the engineer from seeing obstacles on the track, in consequence of which cattle are run over. *Bellefontaine, &c. v. Schruy-hart*, 10 Ohio (N. S.), 116.

If a horse gets upon the track at a place where no fence is required, as, e. g., within a city; the company is not liable, though the injury occurs at a place where a fence is required. *Great, &c. v. Northland*, 30 Ill. 451.

In Illinois, railroads need not fence their track upon their depot grounds in a town. *Galena, &c. v. Griffin*, 31 Ill. 303.

Where a train was running upon such ground, not fenced, at the usual speed, ringing the bell at the time, a colt ran upon the road, before the engine, and was run over and killed. The colt ran upon the road from behind a building, so near the road that it could not be seen by the engineer in season to check the train; but, upon seeing it, he blew the whistle, and the breaks were put down. Held, the railroad was not liable. *Ib.*

The railroad is not bound to keep a patrol at night to protect the fence. *Illinois, &c. v. Dickerson*, 27 Ill. 55.

Nor is it liable if the fence is thrown down and the injury occurs before notice. *The Toledo, &c. v. Fowler*, 22 Ind. 316.

Nor where a fence is burned, but, before a reasonable time for repairing it, animals are killed. *Toledo, &c. v. Daniels*, 21 Ind. 256.

But a railroad was held liable, where its servant neglected to replace bars which he took down, and cattle were killed. *Chapman v. N. Y. &c.* 31 Barb. 399.

So, in New York, under the general railroad act of 1850, requiring railroad companies to erect and maintain fences on the sides of their roads, if a fence is thrown down or blown down, or becomes defective from any cause, it becomes the duty of the company to restore it within a reasonable time. And although it is thrown down by a trespasser, if the company allow it to remain so for two or three weeks, the jury may rightly find this to be negligence. *Munch v. New York, &c.* 29 Barb. 647.

An animal was killed by a freight train, in a place where the railroad had fenced the road, but since the fencing a small town had begun to grow up, though whether immediately upon the line of the road or at a short distance, did not appear. A gap in the fence, through which the animal escaped, had been left open. Held, this evidence was not sufficient, on appeal, to authorize the

supreme court in saying, in opposition to the jury below, that the company was not in fault in failing to close the gap. *Indianapolis, &c. v. Snelling*, 16 Ind. 435.

In an action against a railroad company, to recover for cattle killed by their engines, the following facts were proved: Near where the cattle were killed was a small creek over which the company had built a culvert; below the culvert was the plaintiff's pasture in which the cattle were kept, and across the creek in this pasture he had made a fence of long poles. A freshet brought down driftwood which floated through the culvert and against the fence, and the company aided it through the culvert to prevent its accumulating above to an unsafe amount. At sunset, the plaintiff knew of the exposed situation of his fence, but would not remove his cattle, and in the night the fence was swept away, the cattle went upon the road and were killed; and it was held, that the plaintiff could not recover. *Indianapolis, &c. v. Wright*, 13 Ind. 213.

In Massachusetts, St. of 1846, c. 271, requiring railroads to erect and maintain fences upon any railroad which they might hereafter construct, does not apply to a railroad which was located and partially constructed at the time of its passage. *Stearns v. Old, &c.* 1 Allen, 493.

In New Hampshire, railroads are liable for injuries to cattle caused by want of a fence at *farm-crossings*. But not to those illegally upon the highway. *Chapin v. Sullivan, &c.* 39 N. H. 53, 564.

In Connecticut, § 3, of the act of 1850 (Comp. 1854, p. 753), which provides that all railroads shall construct cattle-guards at highway crossings, unless in the opinion of the railroad commissioners it shall be unnecessary, applies to railroads incorporated before the passage of the act. *Bulkley v. N. Y. &c.* 27 Conn. 479.

The statute of Maryland, concerning cattle killed on railroads, does not expressly allow the owner to recover without regard to negligence on his part, and therefore the common-law rule in this respect is unchanged. It merely raises a *prima facie* presumption of negligence on the part of the railroad. *Keech v. Baltimore, &c.* 17 Md. 32.

Cattle straying on the road-bed, without fault of the owner, are to be paid for, if killed, by the railroad, unless the collision arose entirely from unavoidable accident on the part of the railroad. *Ib.*

In North Carolina, it is not the duty of the owners of cattle to keep them within enclosures, so as to prevent them from tres-

by any unusual or unreasonable operation, the company is not liable to damages.¹ (a)

¹ *Burton v. Philadelphia, &c.* 4 Harr. Barb. 427; *Coy v. Utica, &c.* 23 Ib. 643; 252; *Bordentown, &c. v. Camden, &c.* 2 Aurora, &c. v. Grimes, 13 Ill. 585. Harr. 314. See *Moshier v. Utica, &c.* 8

(a) And a statute, making railroad companies liable for injuries to domestic animals, whether negligent or not, does not apply to an injury from *fright*, where the animal is not touched. *Peru, &c. v. Hasket*, 10 Ind. 409.

passing upon the lands of others. *Laws v. North Carolina, &c.* 7 Jones, 468.

In Indiana, railroads are bound to fence their roads and keep the fences in repair; otherwise they are liable for stock killed, under the statute; if the fences are in repair, the roads will be held to the common-law liability, simply for negligence. Although cattle-pits are not expressly required to be constructed at road-crossings, they may perhaps be embraced under the general term *fence*. *New Albany, &c. v. Pace*, 13 Ind. 411.

A railroad is liable for killing stock where the road was not fenced, to one who is not an occupant or proprietor of the adjoining land. *New Albany, &c. v. Aston*, 13 Ind. 545; *Same v. Bishop*, ib. 566.

No fence is required in the immediate vicinity of the engine-house, machine shops, car-house, and wood-yard. *Indianapolis, &c. v. Oestel*, 20 Ind. 231.

St. of 1853, with regard to the liability for killing cattle when the road is not fenced, applies only to cases before a justice; in other courts the plaintiff must rely only on his rights at common law. *Evansville, &c. v. Ross*, 12 Ind. 446.

In Missouri and Illinois, negligence and unskilfulness are not essential to a recovery under the statute, if the accident happened where there was no fence and no crossing, or where the crossing was not protected by a cattle-guard. *Miles v. Hannibal, &c.* 31 Mis. 407; *Galena, &c. v. Crawford*, 25 Ill. 529.

In Missouri, under § 5 of the act of December 12, 1853, railroads are liable for animals killed, irrespective of the question of negligence, unless the accident occurs within enclosed fields, or at a road-crossing. *Burton v. North, &c.* 30 Mis. 372. See *Gorman v. Pacific, &c.* 26 Mis. 441.

And the liability, in this respect, is the same in the case of companies to which § 52 of the General Railroad Act is applicable. *Ib.*

In Kentucky, the paramount duty of a railroad, through its agents intrusted with the conduct of a train, is to look to the safety of the persons and property thereon; subordinate to which is the duty to avoid

unnecessary injury to animals straying upon the road. *Louisville, &c. v. Ballard*, 2 Met. 177.

A railroad company, which is not bound to fence its track, is not liable for injuries inflicted upon cattle, &c., straying upon the track, unless caused by the wanton and reckless negligence of the company, or its agents or servants. *Ib.*

In Iowa, cattle are lawfully permitted to run at large, and their being found upon a railroad is not of itself evidence of negligence on the part of the owner. If the company have properly enclosed the road, they will be liable only for gross negligence. Otherwise, for any injury occasioned through the want of ordinary care and prudence. *Alger v. Mississippi, &c.* 10 Iowa, 268.

In Wisconsin, railroads are not bound to fence. The cost goes into land damages. *Stucke v. Milwaukee, &c.* 9 Wis. 202.

In California, the rule of the common law requiring cattle to be confined within a close, is not in force. *Waters v. Moss*, 12 Cal. 535.

Though cattle may run at large, yet no person or corporation is answerable for the natural consequences of their intrusion into dangerous places; and, if they get on to a railroad and are injured, the company is liable only if the reasonable exertions of their agents could have prevented the injury. *Richmond v. Sacramento, &c.* 18 Cal. 351.

Allowing one's cows to go at large, near the line of a railroad, is not such negligence, as to excuse the company from the use of ordinary precautions and reasonable care and diligence to avoid injuring them. *Ib.*

If a cow on a railroad track can be seen some distance ahead by the conductor, and by the ordinary means he could get her off unhurt, the company is responsible in damages for an injury arising from his failure to use these means. *Ib.*

The statute, requiring railroad companies to fence, is not to be taken solely as a police regulation, for the benefit of passengers, to the exclusion of its application

§ 47. The statute law in England, and in many of the United States, provides an action for damages in case of *death* upon a railroad, caused by the fault of the company. But under such statute, no action lies where the death was instantaneous, or simultaneous with the injury; the act providing for an action in favor of the party's representatives "in the same manner as if he were living," and in case of "the death of any person entitled to bring such action."¹ Nor can such action be maintained, if the party's own negligence contributed to the injury.² Thus a lunatic was riding, in charge of his father, who had paid the fare of both, through, and taken tickets. The father got out at a station for refreshments, and the train left him behind. The conductor, not knowing the son to be a lunatic, or that the fare had been paid, applied for his ticket, and, not receiving it, stopped the train and had him put out, and he was killed by another train. Held, an action did not lie against the company.³ So an action does not lie under the statute, where the accident was caused by the negligence of a fellow-servant, unless habitually careless and unskilful; or by the use of defective machinery, known by the party to be unsafe.⁴ (See chap. 40.) And in New York an action is held not to lie, where the death occurred in another country.⁵

¹ *Hollenbeck v. Berkshire, &c.* 9 Cush. 478, 481; *Eden v. Lexington, &c.* 14 B. Mon. 204.

² *Tucker v. Chaplin*, 2 Car. & K. 730.

³ *Willots v. Buffalo, &c.* 14 Barb. 585.

See *Pennsylvania, &c. v. Ogier*, 35 Penn. 60; *North v. Robinson*, 44 Penn. 175.

⁴ *Hough v. New Orleans, &c.* 6 La. Ann. 415; *M'Millan v. Saratoga, &c.* 20 Barb. 449.

⁵ *Crowley v. Panama, &c.* 30 Barb. 99.

to cases of stock killed by freight trains. *Indianapolis, &c. v. Snelling*, 16 Ind. 435.

The object of such provisions in railroad charters is to protect the public, and, if violated, the company will be liable for all damages to animals straying upon the track through the want of proper fences, without reference to the want of skill in operating the road at the time, or to the right to have the cattle where they could escape on to the track. *McCall v. Chamberlain*, 13 Wis. 637.

In the passage of the statute concerning animals running at large, the legislature looked to agricultural interests rather than the protection of railroad property. The statute requiring railroads to be fenced is in the nature of a police regulation, partly for the safety of passengers, and could therefore be enacted after the incorporation of the road. *New Albany, &c. v.*

Tilton, 12 Ind. 3; *Same v. Maiden*, 12 Ind. 10; *Indianapolis, &c. v. McAhren*, ib. 552.

And therefore, on the score of public policy, the railroad may be liable for cattle killed, where the road is not fenced, although the cattle be trespassers. *ib. New Albany, &c. v. Fix*, ib. 485.

Hence the railroad cannot divest itself of responsibility by agreeing with separate landholders along the road that they shall keep up the fences; it is a public duty imposed on the railroad, of which it cannot divest itself. *Same v. Maiden*, *supra*.

In England, a railway company is bound so to fence a station, that the public may not be misled, by seeing a place unfenced, into injuring themselves by passing that way, being the shortest, to the station. *Burgess v. Great, &c.* 6 C. B. (N. S.) 923.

§ 48. It is held that no damages can be allowed for the mental sufferings of the survivors.¹ But the damages are to be a reasonable compensation, not an amount estimated by the annuity-tables, according to the value of the party's life.²

§ 49. Inasmuch as a railroad company, like other corporations, must become liable for the most part through the acts of its servants or agents, not expressly or formally authorized; it requires to be but briefly stated, that, according to the general rule of *master and servant*, a railroad is liable for the acts of its servant, acting in the due course of his employment, although he does not follow, or actually disobeys its instructions, either general or special;³ as in the obvious and familiar cases of taking excessive freight or fare; improperly refusing tickets; or recklessly causing the death of animals or human beings.⁴ Thus a railroad company is liable for injuries resulting from the negligence, violence, or carelessness of its conductors, in removing from the cars a passenger who refused to pay his fare or produce a ticket; causing his death.⁵ So if the station-master, or any one to whom he refers the owner of goods, refuse to deliver them; the company is liable in trover.⁶ So, although the train is hired for an excursion, the company is liable for negligence of its servants;⁷ or although the train is under control of State officers.⁸ And the motive influencing the servant is immaterial; as in case of delay caused by a conspiracy of its employees.⁹ But a railroad is held not liable to a passenger, arrested by its servant for non-payment of fare.¹⁰ (a)

¹ *Blake v. Midland*, &c. 10 Eng. L. & Eq. 437. See *Morse v. Auburn*, &c. 10 Barb. 621, 623.

² *Armstrong v. South-eastern*, &c. 11 Jur. 758. See *Oldfield v. New York*, &c. 3 E. D. Smith, 103.

³ *Philadelphia*, &c. v. *Derby*, 14 How. 468; *Lowell v. Boston*, &c. 23 Pick. 24; *South-eastern*, &c. v. *European*, &c. 24 Eng. L. & Eq. 513. See *Philadelphia*, &c. v. *Wilt*, 4 Whart. 143; *Machu v. London*, &c. 2 Exch. 415.

⁴ *Alabama*, &c. v. *Kidd*, 29 Ala. 221.

⁵ *Pennsylvania*, &c. v. *Vandiver*, 43 Penn. 365.

⁶ *Rooke v. Midland*, &c. 14 Eng. L. & Eq. 175.

⁷ *Skinner v. London*, &c. 2 Eng. L. & Eq. 360.

⁸ *Peters v. Rylands*, 20 Penn. 497.

⁹ *Blackstock v. N. Y.* &c. 20 N. Y. 48.

¹⁰ *Eastern*, &c. v. *Broom*, 6 Railway Cas. 561.

(a) Under the General Railroad Act, the liability of corporations organized under it, and their agents, for damages which may result from the neglect of the corporation to erect and maintain fences on the side of the line of the road, attaches, as soon as they have possession of the route for the purpose of constructing the road. A contractor for the construction of the road is

an agent of the corporation, within the meaning of this provision.

Where, therefore, while a contractor was engaged in constructing a railroad through certain premises, and had taken away the fences across the line for that purpose, sheep of the owner of the premises escaped through the opening so made, and were lost; held, the contractor was liable to the

§ 49 *a*. It will be seen (chap. 40) that in general a master is not responsible to one servant for injury caused by the negligence of another. This principle has been often applied in the case of railroads. It is held applicable, where the servants are engaged in *the same general undertaking*, without reference to relative rank; as where one employed in coupling and uncoupling trains was injured by neglect of the engineer and conductor;¹ or where a brakeman was injured by neglect of a switch-tender.² But it is otherwise in case of the employment of incompetent persons, or the use of unsafe machinery, or an unsafe road.³ As in case of want of repair in the road-bed. Thus where a servant was employed to uncouple the cars, which could not be done while the train was still, and which he was doing while they were moving, although he had notice of the defect; the question of negligence was held to be for the jury.⁴ So a railroad company is responsible for causing the death, by running an engine upon him, of a person employed by them to unload their cars, at the spot in question, on a side track; there being other tracks which might have been used, though less conveniently, and although the party had been warned that it was a dangerous place, and although the accident occurred in part from the frightening of his horses.⁵

§ 49 *b*. The question has been raised, whether a railroad corporation is responsible, where it is not itself immediately engaged in conducting the road. Upon this point it is held, that a railroad is liable for injury by fire from its engine, notwithstanding a lease of the road to another company.⁶ So where the road is used by another corporation.⁷ So a railroad is liable for goods delivered to be carried to the State line, though it has leased that part of the road to a corporation chartered in an adjoining State, whose road connects with it at the line.⁸ So, by an agreement between the defendant and another railroad, the defendant was to appoint an agent to receive and collect freight, to sell all passenger tickets,

¹ *Wilson v. The Madison, &c.* 18 Ind. 226; 22 Ind. 26.

² *Slattery v. Toledo, &c.* 23 Ind. 81.

³ *Thayer v. St. Louis, &c.* 22 Ind. 26.

⁴ *Snow v. Housatonic, &c.* 8 Allen, 441.

⁵ *Newson v. New York, &c.* 29 N. Y. (2 Tiff.) 383.

⁶ *Ingersoll v. Stockbridge, &c.* 8 Allen, 438.

⁷ *Indianapolis, &c., v. Solomon*, 23 Ind. 534.

⁸ *Langley v. Boston, &c.* 10 Gray, 103.

owner for the loss. And this, although the owner turned the sheep into the field through which the line ran, after the route was so taken possession of, and while the con-

tractor was constantly throwing down the fences for his purposes. *Gardner v. Smith*, 7 Mich. 410.

and to receive the revenues accruing from the joint operations of the two companies. Held, by this agreement there was no partition of the agency as to the sales of through-tickets over both roads, and the defendant was responsible for the manner in which this agent discharged his duty in the sale of such tickets.¹ So a railroad agreed with individuals, that they might run the road at their own expense, and receive the receipts, "the trains to be run under the direction of the company, and be under their control." Held, the company was liable for the loss of the plaintiff's horse, which, being lawfully on an adjoining lot, strayed therefrom on to the road and was killed, no fence having been erected by the company as the law required.²

§ 49 *c.* But, on the other hand, it is held that the lessee of a railroad, running it for his own benefit, assumes all the public responsibilities of the company, and will be liable for damages to cattle escaping on to the road through the want of fences which they were bound to erect.³

§ 49 *d.* Although a railroad is responsible for an injury, occasioned by want of proper care and prudence on the part of its servants, in the management of a train which is under their exclusive care, direction, and control, though the train belongs to another company; if such injury is occasioned by the negligence of another railroad, whose car, for the purpose of being loaded by the plaintiff, has been placed upon a side-track of the defendants, which is in constant use by other roads, such other company is bound to use reasonable care to prevent a collision, and, if it fails to do so, and the plaintiff receives an injury from a collision while engaged in loading the car, he cannot recover against the company whose cars caused the collision. If such injury results from the negligence of another railroad, which has a joint right with the defendants to use the defendants' track, under a lease from the defendants, and which is accordingly running trains over the defendants' road on its own account, the defendants are not responsible.⁴ (*a*)

§ 50. Some miscellaneous examples of the rights and liabilities of railroad corporations will close the present chapter.

¹ *Northern, &c. v. Scholl*, 16 Md. 331.

³ *M'Call v. Chamberlain*, 13 Mis. 637.

² *Wyman v. Penobscot, &c.* 46 Maine, 162; *Illinois, &c. v. Finnigan*, 21 Ill. 646.

⁴ *Fletcher v. Boston, &c.* 1 Allen, 9.

¹ As to liability, where the road is in the hands of a receiver, see *Ohio, &c. v. Davis*, 23 Ind. 553; *Ohio, &c. v. Fitch*, 20 Ind. 498.

§ 51. If an injury is caused by coming in contact with an animal, which might have been seen early enough to stop the train; and if the train was going unreasonably fast, and no signal given, nor attempt made to arrest the speed; the company is liable.¹

§ 52. A railroad is bound to slacken speed at a turnout, and to give warning when approaching a crossing.²

§ 53. If a collision is caused by misplacement of the rails; the company is liable therefor. It is bound to show that the rails were rightly placed, and cannot trust exclusively to the lever of the switch, when the rails were in open view while moving it. It is also bound to have the rails firmly secured. The right placing of the switch is not conclusive of due care; but the question is for the jury.³

§ 54. In an action against a railroad for passing through the plaintiff's land, he may recover damages upon the ground that his cattle have been thereby prevented from thriving.⁴

§ 55. Under a statute, providing that a bell shall be placed on each locomotive engine, and be rung at the distance of at least eighty rods from the place where the railroad shall cross any travelled public road or street, &c., under a penalty of twenty dollars for every neglect of this provision; a railroad company incurs the penalty as often as it crosses a public road, &c., without giving the required signal. And the section applies as well to cases where the railroad crosses the highway by a bridge at a sufficient elevation to allow travel to pass beneath, as to the case of a crossing on a level.⁵

§ 56. A railroad is not liable for damage caused by the accumulation of snow on the side of a fence, which they erect upon their land, to keep the snow from the road.⁶

§ 57. A railroad, condemned to pay for land, the owner reserving the minerals, is not liable to the land-owner on account of his inability to work a mine, discovered under the road. The road takes an implied right of support, for its contemplated purpose, in the adjacent as well as subjacent land.⁷

§ 58. Where the right of way is granted to a railroad company,

¹ *N. & C. Railway v. Messino*, 1 Sneed, 220.

⁵ *People v. New York*, &c. 25 Barb. 199.

² *Murray v. South Carolina*, &c. 10 Rich. 227.

⁶ *Carson v. Western*, &c. 20 Law Rep. 350, Mass. S. J. C.

³ *Cartiss v. Rochester*, &c. 20 Barb. 282.

⁷ *Caledonian*, &c. v. *Sprot*, 39 Eng. L. & Eq. 16.

⁴ *Baltimore*, &c. v. *Thompson*, 10 Md. 76.

and the company are obliged to make a deep cut in order to enjoy the right, they are not bound to build walls to prevent the falling in of the banks.¹

§ 59. A railroad may exclude persons from their grounds, having no business there connected with the company; and may make rules and by-laws for this end.² (a)

¹ *Hortzman v. Covington*, &c. 18 B. Mon. 218.

² *Barker v. Midland*, &c. 36 Eng. & L. Eq. 253; 7 Met. 596.

(a) As to *injuries by fire* from railroads, see *Sheldon v. Hudson*, &c. 29 Barb. 226; *Piggot v. Eastern*, &c. 3 C. B. 229; *Walford*, 183; *Bass v. Chicago*, &c. 28 Ill. 9; *Lyman v. Boston*, &c. 4 Cush. 288; *Aldridge v. Great*, &c. 3 M. & G. 515; *Baltimore*, &c. v. *Woodruff*, 4 Md. 242; *Huyett v. Philadelphia*, &c. 23 Penn. 373; *Hart v. Western*, &c. 13 Met. 99; *Chapman v. Atlantic*, &c. 37 Maine, 92.

Where by statute a railroad is authorized to *insure*, it is liable for other than direct and immediate loss. *Hooksett v. Concord*, &c. 38 N. H. 242.

The (Mass.) St. of 1840, c. 85, § 1, providing that, when an injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad, the railroad shall be held responsible, and that any

railroad shall have an insurable interest in the property for which it may be so held responsible, along its route, and may procure insurance thereon in its own behalf; extends to *personal property*, although such corporation had no knowledge or reasonable cause to believe that such property was situated where it might be so injured. *Ross v. Boston*, &c. 6 Allen, 87.

As to the restrictions imposed by law upon railroads in regard to *uniformity of charges*, see *Finnie v. Glasgow*, &c. 34 Eng. L. & Eq. 11; *Baxendale v. North*, &c. 30 Law Times, 134; *Ransome v. Eastern*, &c. 31 Ib. 72; 36 (2 N. S.) 376; *Harris v. C. & W. Railw.* 30 Ib. 273; *Baxendale v. Eastern*, &c. Ib. 320.

For liability as to ringing a bell, see *Galena*, &c. v. *Appleby*, 28 Ill. 283.

CHAPTER XXXVII.

CORPORATIONS; TOWNS; LIABILITY FOR DEFECTIVE HIGHWAYS.

1. Municipal corporations; counties; towns; liability for *highways*; statute and common law; *parties* and *uses*, as connected with liability; indictment.
2. For what roads a town, &c. is responsible; *laying out*, use, &c.
3. *Safe and convenient*, meaning of the terms; what constitutes a *defect* or *obstruction*; a question for the jury.
7. Snow and frost.
8. Want of lights, guards, railings, &c.
9. Sidewalks.
10. Notice of defect; implied notice.
11. The plaintiff must not have been himself in fault; concurring or *primary* causes; defect of vehicle, &c.
18. Nature and proof of the injury.
19. Liability of a town, as affected by that of other parties; injuries caused by railroads, &c.
21. General nature of the action; pleadings, &c.

§ 1. THE corporations, to which we have for the most part referred in the preceding chapters, are those instituted for purposes of *trade* or *business*, and usually acting under express charters or acts of incorporation. It remains to speak of another class, sometimes called *quasi-corporations*. This term is said to be applied to such bodies or municipal societies, which, though not vested with the general powers of corporations, are yet recognized, by statutes or immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained, by suits at law.¹ Our plan, however, requires us to notice only one of this class of corporations, to wit, towns or cities; (a) and these almost wholly with reference to one form of liability—that arising from injuries caused by *defective roads or highways*.

¹ Bouv. Law Dict.

(a) In reference to the liability of *counties*, see *Carroll v. Board*, &c. 28 Miss. 38; *County, &c. v. Hosford*, 11 Ill. 170; *Adams v. Logan*, Ib. 336; *County, &c. v. Steele*, 31 Ill. 543; *Brown v. Jefferson*, &c. 16 Iowa, 339; *Crowell v. Sonoma*, &c. 25 Cal. 313.

In California, the right to sue a county is not limited to cases of tort, malfeasance, &c., but is given in every case of account, after presentation to, and rejection by, the

board of supervisors. *Price v. Sacramento*, 6 Cal. 254.

A county is not liable in tort, for the personal misconduct or negligence of the county commissioners, while in the performance of their official functions. *Board, &c. v. Mighels*, 7 Ohio, 109.

A county is not liable for damages recovered against the sheriff, for the escape of a debtor on account of the insufficiency of the jail. *Haygood v. Justices*, 20 Geo. 845.

§ 2. The civil liability of municipal corporations, for injuries sustained in consequence of defects in highways, is dependent upon express statutes, which have been enacted in some of the States; and does not exist at common law.¹ (a) And the only remedy is the remedy afforded by statute; the application of which depends upon the terms and conditions provided in such statute.² The question of *negligence* on the part of the town does not arise in such case, except incidentally, as involved in the question whether the obstruction, insufficiency, or want of repair exists; and this may depend upon the manner in which the defect originated, and the circumstances of its continuance. In such case, the question of negligence is a material inquiry.³ On the other hand, so long as the public highways are kept by towns in a condition safe and convenient for travel, they fulfil all the duty required of them by the laws of the State. Thus if, from neglect to repair a culvert, the water of a stream is cast back on the land of individuals above the road, the town is liable, if at all, only at common law. If the culvert is obstructed by a mere wrong-doer, the town is not liable either by statute or common law.⁴ So, notwithstanding the statutory liability for injuries caused by defective highways, an action cannot be maintained against a town, for damages alleged to have been caused to the plaintiff by the ob-

¹ *Mower v. Leicester*, 9 Mass. 247; *Spear v. Cummings*, 23 Pick. 226. See *Ball v. Winchester*, 32 N. H. 435; *Batty v. Duxbury*, 24 Verm. 155; *Hopple v. Brown, &c.* 13 Ohio St. 324; *Hull v. Richmond*, 2 W. & M. 337; *King v. Police, &c.* 12 La. An. 858; *Nebraska v. Campbell*, 2 Black, 590.

² *Brady v. Lowell*, 3 Cush. 121.

³ *Johnson v. Haverhill*, 35 N. H. 74.

⁴ *Peck v. Ellsworth*, 36 Maine, 393.

(a) In New York, it has been held that there is no obligation, either by statute or common law, upon towns, to keep in repair highways within their limits; nor will an action lie against a town to recover damages for an injury occasioned by a defect in the highway. *Morey v. Newfane*, 8 Barb. 645.

On the other hand, where such liability is imposed by statute, it is held that there is no necessary privity between the traveller and any one but the towns, as to the sufficiency of the highways. The towns must look to those who obstruct their highways for redress. *Willard v. Newbury*, 22 Verm. 458.

Where it was provided in the charter of a borough, that it should "keep in repair all the highways which were opened and within the limits of said borough;" and

also directed, that at stated periods thereafter there should be an apportionment, according to the assessment list of the borough and the town, of the highways in said town, and without the limits of said borough: held, such provision referred only to the ordinary highways which the town was then bound to maintain. *McGowan v. Windham*, 25 Conn. 86.

As to indictments for defective roads; see *State v. Bangor*, 41 Maine, 533; *Sanders v. State*, 18 Ark. 198; *Maine Rev. Stat.* 1841, c. 25.

A refusal to rule in an action against a town for a defective highway, that the defect must be of such a nature that the town would have been liable to indictment therefor, is not open to exception. *Goldthwait v. East, &c.* 5 Gray, 61.

struction of a road by snow, by reason whereof he was prevented from travelling on the road, with his cattle and teams, and on foot, and from transporting his logs and timber to a saw-mill, and from otherwise working in his wood-lot, and about his logs and wood.¹ Nor for the obstruction of a highway by snow, negligently suffered to remain thereon, by reason whereof the plaintiff was prevented from passing over the same with his horses and sleigh, and was put to great trouble, expense, and loss of time in extricating them from the snow.² So an owner of land, prevented from a convenient access thereto by a defect in the highway, cannot maintain an action against the town, liable to keep such highway in repair.³ But it is no excuse for a city, when an injury is sustained by the streets being out of repair, to allege that there was no money in the treasury by which the repairs could be made.⁴ So a city is responsible for any injury resulting from a neglect to keep the streets in repair, whether the neglect is wilful or otherwise.⁵ (a)

§ 2 a. With regard to the *mode of use* of a highway, which will render the town liable for a defect or obstruction, and the parties who may maintain an action for injury thereby occasioned ; it is only those who are using the road for legitimate purposes, in the usual and ordinary mode, that can claim indemnity of a town for injuries caused solely by defects in the highway, or by the combined effect of such defects and pure accident. Hence a traveller, who stops and ties his horse outside of the limits of the highway, though using due care, cannot, if the horse gets loose and runs upon the highway, and suffers an injury from a defect therein, maintain an action against the town.⁶

§ 2 b. Any part of the highway may be used by the traveller, provided he therein conforms to all laws and well-settled rules connected with such use ; children are not restricted in passing and re-passing upon the streets and roads, more than adults. Safety and

¹ Holman v. Townsend, 13 Met. 297.

² Brailey v. Southborough, 6 Cush. 141.

³ Smith v. Dedham, 8 Cush. 522.

⁴ Erie City v. Schwingle, 22 Penn. 384.

See Hutson v. New York, 5 Sandf. 289.

⁵ Erie City v. Schwingle, 22 Penn. 384.

⁶ Richards v. Enfield, 13 Gray, 344.

(a) Companies receiving toll from passengers, upon roads laid out and kept up by them, are responsible for damages resulting from want of repair. And when a highway is superseded by a plank-road laid upon it, the town is not responsible

for its defects. Davis v. Lamoille, &c. 1 Williams, 602.

Towns are responsible for damages resulting from a want of reasonable repair in a *pent road*, taking into consideration its character and importance. Loveland v. Berlin, 1 Williams, 713.

convenience for travellers, their horses and vehicles, are the rule by which it is to be determined, whether there be any defect or want of repair, or sufficient railing upon highways. The public have no right in a highway, except to pass and repass thereon. When children appropriate a part of the road for their sports, the town or city is not responsible for injuries received by them through a defect in the road.¹ So a boy, eleven years of age, cannot maintain an action against a city, for an injury caused by catching his foot between the planks of a sidewalk, while playing on such sidewalk.² But a fireman has no such relation to the city as to prevent his maintaining an action.³

§ 3. With regard to the establishment or *laying out* of a highway, necessary to make a town or city liable for any defect therein ; although a road is used as a town-way, yet, in an action against the town, on account of an injury sustained from a defect in the way, the town may show that the road was not duly laid out and accepted as a town-way.⁴ (a) Thus by Stat. 1803, c. 111, annexing to Boston that part of Dorchester now known as South Boston, the selectmen of Boston were authorized to lay out such streets, in South Boston, as in their judgment would be for the common benefit of the proprietors of the land, and of the town of Boston ; provided, that no compensation should be allowed the proprietors for such streets as should be laid out within twelve months from the passing of the act ; and provided, also, that the town of Boston should not be obliged to complete the streets so laid out, sooner than they might deem it expedient. In pursuance of this authority, the selectmen, within the twelve months, laid out various streets over the entire territory of South Boston, and among others a very long street, denominated Second Street, which subsequently became distinguished in two parts, namely, Second Street East, and Second Street West, or Dorchester Street. The mayor and aldermen, in 1831, adopted an order that Second Street west of Dorchester Street should be made passable, and subsequently passed orders, in 1834 and 1836, appointing committees to "cause Second Street, at South Boston, to be repaired and put in good order," and "to be properly graded and gravelled ;" in pursuance of which, that part of Second Street, known

¹ *Stinson v. Gardiner*, 42 Maine, 248.

² *Blodgett v. Boston*, 8 Allen, 237.

³ *Palmer v. Portsmouth*, 43 N. H. 265.

⁴ *Jones v. Andover*, 9 Pick. 146.

(a) If the public have no means of access, for the town not to build and keep it in repair. *State v. Rye*, 35 N. H. 368.
and no occasion, by and upon which they can use a new highway, it is no nuisance

as Second Street West, had been completed and used as a highway; but no part of Second Street East, though occasionally used as a highway, had ever been ordered to be completed and made passable, unless included in the above orders. In an action against the city of Boston, to recover damages for an injury occasioned by a defect in Second Street East, it was held, that, in order to render the defendants liable, it was not sufficient to prove, that the way complained of had been so travelled and used as to become a highway *de facto*, but that it must appear, not only that such way has been laid out, but that the mayor and aldermen, by an official act, had determined upon its completion, that is, when the same should be graded, fitted for travel, and opened for use; and that the orders above mentioned related only to Second Street West.¹ So, where the owners of land in a city open and dedicate it to public use, as a footway, placing a fence across it, which allows foot-passengers to pass, but is dangerous to horses and carriages; the city, whether they have accepted the way or not, are not liable for an injury occasioned by the fence to a horse and carriage, though driven with ordinary care and skill.² So, if an incorporated company within the limits of a town lay out a road and dedicate it to the public use, the town will not thereby become liable to repair it, unless it has in some way accepted or adopted it as a way.³

§ 3 a. The liability of a town is not to be varied according to its wealth or poverty. The question of ability, to build and keep in repair a given highway, is to be considered by the proper tribunal, in laying out an original highway; but their finding upon that point is conclusive, and remains so until the highway is discontinued. Such question cannot be raised and tried collaterally in a suit for injuries received in consequence of a defect in the highway.⁴ And in an action against a town for an injury sustained in consequence of a defect in a highway, a declaration that the way was "a town way or road leading, &c., which road" it was the duty of the town to maintain; is supported by evidence, that it was an *ancient* road or way, used by the public and the town, and kept in repair by the town.⁵ So the use of a road for more than twenty years is evidence of its being a public highway,

¹ *Bowman v. Boston*, 5 Cush. 1.

² *Hemphill v. Boston*, 8 Cush. 195.

³ *Bryant v. Biddeford*, 39 Maine, 193.

⁴ *Winship v. Enfield*, 42 N. H. 197.

⁵ *Stedman v. Southbridge*, 17 Pick. 162.

See *State v. Sartor*, 2 Strobb. 60; *Calder v. Chapman*, 8 Barr, 522.

especially if it has been yearly repaired during that time, and included within the limits of surveyors' warrants. And its width, in such case, where it is not fenced out on both sides as a road, will extend the usual distance each side from the travelled path.¹ And it seems, that, if a town, in making a county road, deviate from the true location, they are estopped, in an action against them for an injury occasioned by its being out of repair, to deny their liability to maintain it as they have made it.² So the erection and support of a bridge by a town, and the use of it by the public for thirty-eight years, are sufficient proof of its existence as a highway, on the presumption of a laying out, a grant, or a dedication, to render the town liable for an injury occasioned by its being out of repair.³ So a way is sufficiently shown to be a highway, by proof that it has been known and used as a highway for forty years, and during that time has been repaired by the town.⁴ So a city is liable for defects in one of its highways, after it is built and opened to the public, though the time allowed for its construction after acceptance had not elapsed, if the city had reasonable notice of the defects.⁵ So a town becomes responsible for an injury occasioned by a defect in a highway, from the time when the way is opened for public travel. And evidence that a road has been paid for by order of the commissioners (the tribunal for laying it out), and in fact travelled since it was left by them as finished, is admissible against the town, to prove that the road had been opened for public use, and accepted and adopted by the town.⁶

§ 4. Where any liability upon this subject is imposed by statute, it is, in general, only required of towns to keep their roads in such state of repair, as to be *safe and convenient*, without defining what imperfections would constitute a ground of action. (a) Whether a road is in such a condition or not, is a question for the jury under the instructions of the court.⁷ Thus it cannot be determined by the court, *as matter of law*, that a stick of wood of given dimen-

¹ Hall v. Richmond, 2 W. & M. 337.

² Williams v. Cummington, 18 Pick. 312.

³ Ibid.

⁴ Reed v. Northfield, 13 Pick. 94.

⁵ Blaisdell v. Portland, 39 Maine, 113.

⁶ Bliss v. Deerfield, 13 Pick. 102.

⁷ Merrill v. Hampden, 26 Maine, 234; 37 Ib. 250; 17 How. 161; 35 N. H. 74.

(a) See p. 387, n. "Defect or want of repair" is the language of the statute in Massachusetts. Rev. Stats. 246. See Gen. Stats. Similar terms are used in other States. In Maine, "safe and convenient" is the statutory requisite.

The liability of towns is sometimes held to require them, after having reasonable notice of the existence of obstructions in their highways, to remove them, or *make safe by-ways to pass around them*, or to *see*

a traveller, while in the exercise of ordinary care, received an injury, in consequence of driving his wagon against a *post*. It appeared, that the line of the highway was not indicated by any visible objects, and the post was near the true line, and within the limits of the general course and direction of the travel, and rendered the travelling dangerous; that there was nothing to indicate that the post was not within the way intended for public travel; and that the town, though they had reasonable notice of the course of the travel, and that the post was dangerous to travellers, suffered it to remain an unreasonable time. Held, the town was liable.¹ But a town is not liable for an injury sustained by a traveller, while straying outside of the limits of the highway, when the whole highway and the land next adjoining are safe and convenient to travel upon; nor are towns obliged to maintain fences merely to prevent travellers from straying out of the highway.²

§ 9. *Sidewalks*, when a part of the public streets, as in the city of Boston, are to be kept in all parts safe and convenient for public use. Thus a sidewalk six and a half feet in width. And this, notwithstanding an act respecting the streets of Boston, and a city ordinance passed in pursuance thereof, authorizing the surveyors of highways to regulate the width and height of sidewalks, and to accept and bind the city to maintain them, when built and relinquished to the city by the abutters.³ So in an action for injuries sustained by reason of a fall on a sidewalk, ordinarily used by foot-passengers, occasioned by cutting a ditch in the ice thereon, for the purpose of conveying water into a side gutter of the main street of the city; held, the sidewalk was a component part of the highway; that it was for the jury to determine whether it was in suitable repair, and that the city was liable, provided the defect was one of which it could reasonably have had knowledge, and the plaintiff in the exercise of due prudence and care.⁴ So it is the duty of cities and towns to keep that part of the street, which lies between the carriage-way and the sidewalk, in such repair, that foot-passengers may cross any part thereof with safety, using reasonable care and caution; and the establishing of raised crossings at proper distances is not a sufficient compliance with this duty. But the projection of the movable grating of a culvert,

¹ *Coggswell v. Lexington*, 4 Cush. 307.

² *Sparhawk v. Salem*, 1 Allen, 30.

³ *Bacon v. Boston*, 3 Cush. 174.

⁴ *Hall v. Manchester*, 40 N. H. 410.

from one to two inches above the level of the edge of the sidewalk, against which it rests, is not a defect, which makes the city responsible for an injury occasioned by stumbling over the grating.¹ So a city is liable for an injury caused by the fall of an *awning*, projected over a sidewalk by the owner of a building, if dangerous to travellers.²

§ 10. Previous *notice* of the defect or obstruction is usually made an express condition of the town's liability. (a) Thus if an obstruction exists by inevitable accident, without fault or neglect

¹ *Raymond v. Lowell*, 6 Cush. 524.

² *Drake v. Lowell*, 13 Met. 292.

(a) See *Batty v. Duxbury*, 24 Verm. 155; *Hull v. Richmond*, 2 W. & M. 337. Under a statute, imposing such liability without this condition, a *turnpike* corporation was held liable for damage sustained in consequence of a *latent* defect in the road, though they used due diligence to discover defects, and keep the road in repair. *Yale v. Hampden*, &c. 18 Pick. 357.

Recent cases in New Hampshire well illustrate the point under consideration.

Where the cause of the accident and injury is such — whether the act of Providence, or the negligent or malicious act of man, or a combination of these causes — that the town could not have had notice of it, or, if notified, could not have removed or remedied the cause, or have prevented the accident, the town is not liable. *Chamberlain v. Enfield*, 43 N. H. 356; *Palmer v. Portsmouth*, *Ib.* 265.

A jury were instructed, that "a town was bound at all times to have their highways in a reasonably safe condition for the customary travel, and that it would furnish no answer to the claim of the traveller for damages, who should suffer an injury resulting from a defect in the highway, without fault on his part, that the defect was produced by the elements, and the town had no notice of it, or opportunity to repair it." Held, the latter branch of the instruction was erroneous, and the jury should have been instructed, that, if the injury resulted from a defect occasioned by the recent sudden action of natural causes, the town was not liable, unless, under the circumstances of the case, they ought to have repaired the defect before the accident happened, and had reasonable opportunity so to do; and if they could have had no notice of it, either express or implied, or reasonable opportunity to repair it, the defect was not an obstruction, insufficiency, or want of repairs, within the meaning of those terms as used in the statute, giving to

travellers a remedy against the town. *Hubbard v. Concord*, 35 N. H. 52.

A stick of wood accidentally fell from a load without the fault or neglect of the driver. The plaintiff shortly afterwards passed in his wagon, one wheel of which ran upon one end of the stick, in such manner as to throw up the other end against the wagon, by means of which the plaintiff was thrown out and injured. The jury were instructed, in substance, that if the stick, considering its character and dimensions, should be found by them to be such an obstacle to the customary travel, as that the highway, with that upon it, was not reasonably safe; yet, if it came upon the highway by inevitable accident, without the fault or neglect of any person, and the town or its authorities could have had no notice of it, nor any opportunity to have known of it by reasonable care and diligence on their part, before the accident, the town were not liable. Held, sufficiently favorable to the plaintiff. *Johnson v. Haverhill*, 35 N. H. 74.

In Massachusetts, the Court remark, in a recent case, "The facts must be such as to lead to the inference that the proper officers of the town, whose duty it is to attend to municipal affairs, did actually know of the existence of the defect, or with proper care and vigilance might have known of it. Such knowledge may be inferred from the length of time during which the defect has existed, from the central position and publicity of the place where it exists, and any other circumstances which tend to show its notoriety." *Donaldson v. Boston*, S. J. C. Suffolk, Oct. 1859, Law Rep. April, 1863, p. 348; *Reed v. Northfield*, 13 Pick. 98.

The fact that the plaintiff is himself an inhabitant and had notice of the defect is immaterial, except as affecting the question of reasonable care on his part. 13 Pick. 98.

on the part of any person, it is not within the statute, unless the town had notice of it, express or implied, and reasonable opportunity, by proper care and vigilance, to have removed it before the accident occurred.¹ But the liability does not depend upon the fact, whether the officers or agents had actual notice of the defect, provided it were of such a character and of such continuance at the time of the accident, that the town was reasonably bound, under all the circumstances, to have remedied it.² Thus notice may be *inferred*, from the notoriety of the defect, and its continuance for such a length of time, as to lead to the presumption that the proper officers of the town knew, or with proper vigilance and care might have known of it.³ A former failure of a culvert may be evidence of defective construction, and of the knowledge of the fact by the town authorities.⁴ So if an injury is caused by the elevation of one edge of a plank, which is laid over an open space left for the passage of water, and this is found to be an actionable defect; it is enough to authorize a verdict for the plaintiff, if the plank has been split, loose, liable to change, and unsafe, for twenty-four hours (the statutory period) before the accident, or if the city authorities had reasonable notice of its unsafe condition, although the position of the plank which was the immediate cause of the accident had continued but for a short time.⁵ So the occurrence of a rain and thaw is sufficient notice of a defect in a temporary way over a frozen ditch.⁶ So express notice to two of the inhabitants, capable of communicating the information, though not among the principal men of the town, and not assessed for public taxes, is sufficient notice to a town.⁷

§ 11. Upon the principle *in pari delicto*, already explained (chap. 4), when an injury is the consequence of negligence on both sides, no action can be maintained.⁸ One injured by an obstruction in the highway cannot maintain an action, if he did not himself use ordinary care.⁹ (a) Or such care as persons of common prudence generally exercise.¹⁰ In other words, it must be proved, that the highway was not safe and convenient; that the plaintiff

¹ Johnson v. Haverhill, 35 N. H. 74.

² Howe v. Plainfield, 41 N. H. 135.

³ Tinker v. Russell, 14 Pick. 279.

⁴ Willey v. Portsmouth, 35 N. H. 303.

⁵ Winn v. Lowell, 1 Allen, 177.

⁶ Savage v. Bangor, 40 Maine, 176.

⁷ Mason v. Ellsworth, 32 Maine, 271.

⁸ Coombs v. Purrington, 42 Maine, 332.

⁹ Smith v. Smith, 2 Pick. 621; 26 Maine, 234; Farnum v. Concord, 2 N. H. 392; Wilson v. Susquehannah, &c. 21 Barb. 68.

¹⁰ Farrar v. Greene, 32 Maine, 574.

(a) As to the proof of negligence on the part of the defendants, see Wilson v. Susquehannah, &c. 21 Barb. 68.

exercised ordinary prudence and care; and that the injury was occasioned by the defect in the highway alone.¹ When the injury is occasioned by a defect in the highway, and want of care on the plaintiff's part, jointly, the town is not accountable.² Thus, if the injury was occasioned jointly by a defect in the highway, and a defect in the plaintiff's horse, carriage, or harness, rendering the same unsafe or unsuitable, the plaintiff cannot recover, although he had no knowledge of such deficiency, and was in no fault for the want of such knowledge.³ And the burden of proof is upon the plaintiff. The defendants are not bound to prove that the injury was caused by his carelessness.⁴ Thus, in an action for an injury sustained by the overturning of the plaintiff's carriage, the burden of proof is on the plaintiff, to show that he was at the time driving with ordinary skill and diligence.⁵ (a) So, if the neglect to repair is averred to be *on the sides*, and without the travelled path, and the declaration further alleges, that the plaintiff was injured in turning out to go by a team with a cart-load of wood; he must show that he exercised due care in turning out and passing by, and that the damage arose from the want of proper attention by the town to the sides of the road, and not from himself or some independent accident.⁶ So it is not a correct instruction to the jury, that the action can be maintained, though the plaintiff knew of the defect, if it were not of a character from which an injury must so manifestly result in his attempt to pass, as to render it unreasonable for him to make the attempt. The proper instruc-

¹ Moore v. Abbot, 32 Maine, 46.

² Farrar v. Greene, Ib. 574.

³ 32 Maine, 574; Coombs v. Topsham, 38 Maine, 204.

⁴ Merrill v. Hampden, 26 Maine, 234.

⁵ Adams v. Carlisle, 21 Pick. 146.

⁶ Hall v. Richmond, 2 W. & M. 337.

(a) In an action against a *bridge corporation*, for an injury sustained in consequence of the lamps not being lighted as required by law; the burden of proof is on the defendants. *Worster v. Canal*, &c. 16 Pick. 541. See *King v. Police*, &c. 12 La. Ann. 858.

Provision is sometimes made by statute, for a town's recovering from the party creating an obstruction in the highway the damages which the town itself has been compelled to pay. In such action, the town is entitled to recover, although defects and want of repairs in the highway may have contributed to the accident which resulted in the injury. *Littleton v. Richardson*, 32 N. H. 59.

The true question for the jury is, whether

the incumbrance was the direct and proximate cause of the accident, — that without whose existence it would not have happened. If so, the town may recover, although their negligence may have contributed more remotely to its occurrence, and even although it might have been prevented by a due performance of duty, and the exercise of proper vigilance on their part. *Ibid.*

(In New Hampshire, money expended in defending the former suit cannot be recovered. Nor the expenses of removing the incumbrance. By the terms of the statute, the remedy is limited to the damages and costs paid the person suffering injury. *Ibid.*)

tion is, that, if the defect were such, that men of ordinary care and prudence, having knowledge of the defect, would not, under ordinary circumstances, have attempted to pass at their own risk, the plaintiff had no right to try the experiment at the risk of the town.¹ So where the plaintiff's eyesight was poor and weak, the omission to instruct the jury, upon request, that common prudence requires of a person of poor sight extraordinary care, in walking upon the public streets, and in avoiding obstructions, is ground for a new trial.² So two women attempted to drive over a causeway, laid across a cove, and leading to a ferry in the Connecticut river. There was a freshet in the river, and the water was rising rapidly, and already covered the causeway. The water was also very turbid, and there was a strong current through the cove. The causeway was twenty-five rods long and nineteen feet wide, and there was a bridge about nine rods from the entrance, raised above the level of the causeway, and then standing above the water. The women lived in the neighborhood and were acquainted with the road. Before driving on the causeway, they inquired of a woman who lived close by, whether she should dare to cross; to which she replied that she should not, unless she had a very gentle horse. The women drove in and reached the bridge, the water rising to the hubs of the forewheels. Here they stopped for a while, and could easily have obtained assistance to enable them to turn back. Beyond the bridge there was nothing visible to indicate the line of the road. They passed on, soon became alarmed and bewildered, and drove off the causeway, and one of the women was drowned. In a suit brought by her administrator against the town, to recover damages for the injury, on the ground that it was caused by the negligence of the town in not keeping up a railing along the causeway, and in which the jury rendered a verdict for the plaintiff; a new trial was granted as for a verdict against evidence, on the ground that the deceased had been guilty of want of ordinary prudence in attempting to pass over the causeway.³

§ 11. *a.* But driving, in a violent storm, through the streets of a city with which the driver is unacquainted, is not, of itself, negligence, which will prevent him from recovering for injury received through defects in the highway.⁴ So a request to instruct the

¹ *Hubbard v. Concord*, 35 N. H. 52.

² *Winn v. Lowell*, 1 Allen, 177.

³ *Fox v. Glastenbury*, 29 Conn. 204.

⁴ *Milwaukee v. Davis*, 6 Wis. 377.

jury, that, if the plaintiff was intoxicated, this, of itself, would preclude him from the right to recover, was properly refused; the question, what constitutes ordinary care, being for the jury.¹ And, in general, the question of negligence, on the part of the plaintiff, is to be determined by the jury, under all the circumstances of the case.² The fact that he had previous knowledge of the defect is not conclusive evidence of negligence. Nor has the fact, that he was an inhabitant of the town and knew of the defect, but omitted to give notice of it to the town, any bearing on the question of the town's liability.³

§ 12. According to the principle heretofore laid down, (chap. 4,) a town has been held liable for an injury occasioned by a defect in a highway, and which would not have otherwise occurred, though the *primary* cause is a pure accident, as, for example, the failure of some part of a carriage or harness; provided the accident occur without the fault or negligence of the party injured, and be one which common prudence and sagacity could not have foreseen and guarded against.⁴ A traveller is bound only for ordinary care and prudence, in providing a suitable horse, carriage, and harness. Also to exercise ordinary care, skill, and prudence, in the management of his team; such as mankind in general, and not persons of the same class or division of mankind as himself, are accustomed to use.⁵ So the town may be responsible, though the plaintiff's horse, without the fault of the town, should be running violently at the time, and though the injury might not have occurred but for such violent running. And to account for the violence of his horse, the plaintiff may show that, near the defect where the damage occurred, there was another defect which he had just passed, though without injury.⁶ But if the vices of the horse or the defects in the carriage contributed to the injury, the plaintiff must not only show that he did not know, and had no reason to suppose, that such vices or defects existed, but that he was in no fault in not knowing it.⁷ And a town is not responsible, if a horse, being frightened by an accident, breaks away from his driver, and escapes from all control, and afterwards,

¹ Stuart v. Machias, 48 Maine, 477.

² Bigelow v. Rutland, 4 Cush. 247. See

Cummins v. Spruance, 4 Har. 315.

³ Tinker v. Russell, 14 Pick. 279.

⁴ Palmer v. Andover, 2 Cush. 600. See

Hyde v. Jamaica, 1 Williams, 443.

⁵ Clark v. Barrington, 41 N. H. 44;

Tucker v. Henniker, Ib. 317.

⁶ Verrill v. Minot, 31 Maine, 399.

⁷ Winship v. Enfield, 42 N. H. 197.

while running at large, meets with an injury through a defect in a highway.¹ So a horse, drawing a sleigh, and carefully driven, became frightened and excited by the striking of the sleigh against a post in the highway, broke from the driver, turned, and, at the distance of fifty rods from the place of collision, knocked down the plaintiff, who was passing on foot, and using reasonable care. In an action against the city, held, though the post was a defect in the highway, the city was not responsible, the defect not being the immediate cause of the injury.² And, in general, a town or city is not liable, for an injury caused by the combined effect of the unsafe condition of a highway, and the unlawful or careless act of a third person.³ Nor unless the accident is occasioned by causes which occurred entirely within the highway.⁴

§ 13. A declaration for such injury, that at the time "the plaintiff was walking along and across the highway, in the due prosecution of his business and in a proper manner," is a sufficient allegation, after verdict, that the plaintiff was at the time in the exercise of ordinary care.⁵ Nor is it necessary, in order to enable the plaintiff to give evidence of ordinary care, that his declaration should aver that fact; if it avers that the injury was caused by the defect in the highway.⁶

§ 14. The questions, whether the plaintiff conducted with care and prudence, whether the road was in a sufficient state of repair, and whether the accident occurred mainly through the insufficiency of the road, and entirely without fault on the part of the plaintiff; are held to be questions of fact, ordinarily mixed, however, with questions of law, requiring comment by the Court. But, how far towns are bound to clear away obstructions, natural or artificial, from that portion of the highway exterior to the wrought way; and how far they shall be held responsible for accidents occurring in travelling over this lateral space, either voluntarily or on account of difficulties existing in the ordinary track, or for such as may occur in consequence of diverging into the neighboring field from a real or supposed necessity, or for such as may arise in attempting to pass a bridge obviously unsafe or dangerous, or in fording a stream in such case; are mainly questions of law, calling for special instructions from the Court. Thus the

¹ *Davis v. Dudley*, 4 Allen, 557.

² *Marble v. Worcester*, 4 Gray, 395.

³ *Shepherd v. Chelsea*, 4 Allen, 113.

⁴ *Rowell v. Lowell*, 7 Gray, 100.

⁵ *Raymond v. Lowell*, 6 Cush. 524.

⁶ *May v. Princeton*, 11 Met. 442.

plaintiff was travelling upon the highway in the village of Montpelier. The travelled path was from twenty to thirty feet wide; in the ditch, and three feet from the outer edge of the travelled path and about five or six feet from the fence, a hole had been dug, about three feet square and two feet deep, of which the highway surveyor had notice. There was nothing between the hole and the fence but an elevated sidewalk. There was some snow upon the sides of the road, but none in the travelled path. Sleighs had been driven in the ditch, and had made a path there upon the snow at the place where the hole was dug. The plaintiff was passing along the highway, in a dark night, with a horse and sleigh, and ran into the hole, whereby his horse and sleigh were injured. Held, the jury should have been instructed, that, if the plaintiff diverged from the travelled road without necessity, but merely for the purpose of having the benefit of snow, or if the horse took the same direction from a natural instinct, or from inability to see the road on account of the darkness; the town should not be responsible.¹ (a)

§ 15. If a traveller, in the exercise of ordinary care and prudence, voluntarily leaps from his carriage, because of its near approach to a dangerous defect in the highway, and thereby sustains an injury, the town is liable, although the carriage do not come in actual contact with the defect. But these facts do not support a declaration, that the party was "violently thrown from a wagon upon the ground by reason of a defect in the highway;" though the objection ought ordinarily to be taken before the case is submitted to the jury. And if such case is tried and submitted to the jury, entirely upon the hypothesis that the plaintiff was so thrown to the ground; and afterwards, to an inquiry by the jury, the Judge answers, that the action can be maintained, if the plaintiff voluntarily jumped to the ground through imminent peril; a verdict against the defendants will be set aside.²

§ 16. A traveller, to recover for loss caused by a deficiency in a road, is not obliged to look far ahead, in order to guard against obstructions, which ought not to be suffered to exist. Thus where

¹ Rice v. Montpelier, 19 Verm. 470.

² Lund v. Tyngsboro, 11 Cush. 563.

(a) The rule of the road, of *passing to the right*, only applies to and regulates the conduct of travellers *as between themselves*. Its violation cannot show want of care in regard to defects in the road. Grier v. Sampson, 27 Penn. 183.

a person, travelling with a horse and wagon, might from an eminence in the road have seen, that a causeway, at a considerable distance, which he intended to pass over, was covered with water; but, when he descended the hill, the causeway was out of sight, until he had proceeded too far either to turn back or go on with safety; and he then used ordinary care in endeavoring to extricate his horse from the danger, but without success: he may recover for the loss.¹

§ 17. Where one, who had occasion to cross, in the daytime, from one side of a street to the other, selected for that purpose a portion of the street, which, having been necessarily and properly appropriated for a drain, was covered by an iron grating, and, in attempting to cross over the grating, fell and was injured, there being no reason for attempting to cross at that place rather than any other part of the street; this is not ordinary care, and he cannot recover damages.² Nor one who goes out of the highway, because of the defect therein, into the adjoining land, and there receives an injury.³ But, though there were other streets by which the party might have reached the point he was aiming at, the city is liable, if it did not give notice and warning, by closing up the street out of repair, or in some other way.⁴

§ 18. With regard to the nature and proof of the *injury*, necessary to maintain an action, it is held, in New Hampshire, that the statute limits the remedy to such injuries as are received by a person, his team, or carriage, directly from the defect, in using or attempting to use the highway as such.⁵ So, in Connecticut, under a statute making towns liable to pay "just damages" for defects in roads and bridges, a town is not liable for the loss of service, and expense of the nursing, of a wife and daughter, injured by such defect.⁶ So, by "damage in one's property," within the meaning of the statute of Maine, is intended some injury to an article, by which its value is destroyed or diminished; not a mere loss of time, or an addition to expenses.⁷ But bodily pain is among the items for which compensation is to be made.⁸ And in an action for "bodily injury," the jury may also allow for loss

¹ *Thompson v. Bridgewater*, 7 Pick. 188.

² *Raymond v. Lowell*, 6 Cush. 524.

³ *Tisdale v. Norton*, 8 Met. 388.

⁴ *Erie, &c. v. Schwingle*, 22 Penn. 384.

⁵ *Ball v. Winchester*, 32 N. H. 435.

⁶ *Chidsey v. Canton*, 17 Conn. 475.

⁷ *Weeks v. Shirley*, 33 Maine, 271; *Verrill v. Minot*, 31 Ib. 299.

⁸ *Mason v. Ellsworth*, 32 Ib. 271.

of time resulting from the injury, and for expenses suitably incurred to obtain a cure.¹ (a)

§ 19. The question of a town's liability is sometimes affected by the actual or supposed responsibility of other parties for the same injury. (b) Thus it is held that such liability is not varied or discharged, though the defect is occasioned by the exercise of the right of an adjoining owner of land to use the street or way for some private purpose, not inconsistent with the right of the public.² So the town are primarily liable, although the defect is caused by a railroad corporation, in constructing their road according to their charter,³ and though the railroad is required by its

¹ Sanford v. Augusta, 32 Maine, 536.

² Phillips v. Veazie, 40 Maine, 96.

³ Bacon v. Boston, 3 Cush. 174.

(a) As proof of the injury, groans or exclamations, uttered by the plaintiff at any time, expressing present pain or agony, and referring by word or gesture to the seat of the pain, are admissible for the plaintiff. Bacon v. Charlton, 7 Cush. 581.

(b) There may be a concurrent remedy against the town and the party causing the obstruction. Durant v. Palmer, 5 Dutch. 544.

A party placing obstructions in a highway is answerable to the town, and bound by a judgment recovered by a traveller against the town for such cause, if he has due notice of the suit. In an action against him, unless it appears on the face of the record that the recovery must have been for the same cause, that fact must be proved, to make the judgment evidence of anything but the fact of its recovery. Where the declaration against the town alleged the damage to have resulted from the obstruction now complained of, and from want of proper repair and of a suitable railing, it must be shown that the recovery was on account of the obstruction. And evidence is admissible that the recovery was on account of the defects of the road and its railing. Littleton v. Richardson, 34 N. H. 179.

Ordinarily, where incumbrances or obstructions have been placed in a highway by individuals, the town will be liable in the first instance to the injured party, and may have a remedy over upon the party causing the obstruction. Winship v. Enfield, 42 N. H. 197.

An exception is made, where a railroad has necessarily created a danger which the town cannot obviate. Willey v. Portsmouth, 35 N. H. 303.

The defendant leased the lower story of

a building for shops, and portions of the upper story, miscellaneous, including one or two rooms, to the town, the plaintiffs, himself remaining in possession of the residue. An awning erected along the whole front for the benefit of the shops fell, from a defect therein, and injured a passenger, who recovered damages of the plaintiffs for such injury. Held, the plaintiffs might recover the damages without joining the occupants of the shops in the action; and that, after notice of the previous action, a request to defend it, and a statement that if they were liable, he was liable to them, because the injury, if any, must have occurred from his negligence; the former judgment was conclusive, in the present action, of a defect in the highway, the injury to the former plaintiff while exercising due care, and the amount of injury. Milford v. Holbrook, 9 Allen, 17; see Chicago v. Robbins, 2 Black, 418. (Though it would be otherwise if both were in fault.)

The same principle has been applied to the action of a town against a railroad to recover the amount recovered in a previous suit against the town. Hamden v. New Haven, &c. 27 Conn. 158.

In case of notice of the suit, the railroad are *estopped* and liable for the costs. Veazie v. Penobscot, &c. 49 Maine, 119.

Where by statute several towns and a railroad are jointly required to keep a bridge in repair, and the municipal officers of one of the towns are to have the care and superintendence of it; such officers are agents of all the parties, and the railroad cannot maintain an action against such town for damages caused by a defect in the bridge. Malden, &c. v. Charlestown, 8 Allen, 245.

charter so to construct its works as not to obstruct the safe and convenient use of any highway.¹ And municipal authorities have no power to modify or repeal a law, declaring certain streets to be public highways, by consenting to the construction of a railroad thereon. The rights of the public will be protected against the municipal as well as the railroad corporation.² Thus by Stat. 1830, c. 4, establishing the Boston and Lowell Railroad Corporation, it was provided (§ 11), that, if the railroad should cross any highway, it should be so constructed, as not to impede the safe and convenient use of such highway. Where an excavation was made by such corporation in a highway, for the purpose of constructing the railroad across it, and an injury sustained by a person travelling on the highway, in the evening, in consequence of being thrown into the excavation; it was held that the town was liable to an action, although the town had given notice to the superintendent of the work on the railroad, that a barrier must be put up for the protection of travellers on the highway, and such superintendent had promised that this should be done.³ So when railroads obstruct the highways, towns must provide a suitable and proper by-way around the obstruction, and use proper and reasonable precaution to divert the travel. Such by-way is an open public way for the time being, and the town must make it reasonably safe for the public travel, or see that it is made so by others. And, though the railroad be bound to make the by-ways, and fail to make them safe, this will not exonerate the town.⁴ So a statutory provision, that it shall be the duty of commissioners of highways, to cause all roads located by them to be constructed and finished to their *acceptance*, was held not to vary the responsibility of towns for injuries occasioned by defects in highways, nor in any event to give an action against the county. The acceptance by the commissioners, contemplated by the statute, is not the acceptance of the highway, or the act which opens it as a highway for public use, but of the construction of the road.⁵ But a town is not liable for injuries happening upon a *ford-way*, lying out of the limits of the highway, and used by reason of the neglect to repair a bridge, although with the consent of the land-owner; if not opened according to statute, or dedicated to, and

¹ Elliot v. Concord, 7 Fost. 204.

² Commonwealth v. Erie, &c. 27 Penn. 339.

³ Currier v. Lowell, 16 Pick. 170.

⁴ Batty v. Duxbury, 24 Verm. 155.

⁵ Bliss v. Deerfield 13 Pick. 102.

accepted by the town. The town's neglect to repair the bridge must be the immediate cause of an injury, in order to render it liable therefor.¹

§ 20. But the general rule is laid down, that, if the injury were caused by the negligent acts of a third person in the highway, that will not make the town liable, unless the highway were defective, or in some way obstructed or encumbered.² So a town is not liable for an injury occasioned to a traveller passing from a public highway to a railroad station, through a road opened by the proprietors of the railroad for that purpose, by a block of stone lying within the limits of the highway, as located, and obstructing the entrance of the road to the station, if it does not obstruct the road-bed of the highway.³ So, if the proprietors of a railroad, acting within their authority, construct a cattle-guard in their road, at a place where it crosses a highway on the same level; and the town erect and maintain a sufficient and proper barrier against such cattle-guard up to the railroad, and as far as can be done without impeding the passing of cars thereon: the town are not responsible for an injury sustained by a traveller on the highway, in consequence of his falling into the cattle-guard.⁴ So a town is not responsible for a defect or want of repair in a bridge, whereby a public highway passes over a railroad, the proprietors of which are bound by law to keep the bridge in repair.⁵ So the licensing of an individual to occupy a part of a public street exclusively for his own benefit, by erecting and using a railroad for the transportation of rocks and gravel, is not among the powers granted to a city council. No action lies against the city by a person suffering special damage by reason of such railroad, although the party licensed may have given bond to indemnify the city against such damages.⁶

§ 21. With regard to the technical character of, and the pleadings in, the action now under consideration, the action is not an action *respecting an easement on real estate* within the meaning of a statute which uses these terms, and therefore cannot be commenced in Massachusetts in the Supreme Court.⁷

§ 22. Great liberality has been allowed in the form of declaring

¹ Hyde v. Jamaica, 1 Williams, 443.

² Chamberlain v. Enfield, 43 N. H. 356.

³ Smith v. Wendell, 7 Cush. 498.

⁴ Jones v. Waltham, 4 Cush. 299.

⁵ Sawyer v. Northfield, 7 Cush. 490.

⁶ Green v. Portland, 32 Maine, 431.

⁷ Hunt v. Hanover, 8 Met. 343.

in this class of actions ; more especially after a verdict for the plaintiff. Thus the particulars of defect need not be alleged ; but only that the injury was caused by the defect, insufficiency, and want of repairs of the highway. Nor is it necessary that the injuries should be particularly described. It is enough if the declaration shows a bodily injury, if this is the ground of action. Thus, if the declaration allege, that the plaintiff and his child "were thrown from his wagon with great force and violence, and he and the child greatly injured and damaged thereby," it will be good after verdict. Nor is it necessary, if the declaration alleges that the injury was caused by defect of the highway, to aver that the plaintiff was himself in the exercise of ordinary care. Nor, where the highway described is alleged to be in the defendant town, to aver, in addition, that the part of it where the accident happened was in that town. And, if the declaration allege, that the road was a highway which the town was bound to maintain, on the 8th of July, and at the time when the suit was brought, and that the accident happened "on the said 8th day of July ;" it is a sufficient allegation, after verdict, that the town was bound to maintain the highway when the accident happened.¹ (a)

§ 23. A declaration averred, that the plaintiff, on August 27, 1831, "at Chelmsford, was travelling on a highway in Chelmsford, which highway the town are by law bound to keep in repair, on a part of the highway leading from the dwelling-house of I. S. to the stone guide-post near the Middlesex Turnpike in Chelmsford ;" that the highway within such limits was defective and in want of repair ; that the plaintiff, "being so travelling as aforesaid, at the time and place aforesaid," sustained the injuries complained of in consequence of such defect and want of repair. After a verdict for the plaintiff, it was held that the declaration was sufficient, although it did not state that the town was bound by law to maintain and repair the highway where the accident happened *at the time of such injuries*, and although there was no direct averment that the defective part of the road where the accident happened was within the town of Chelmsford, and although there was no allegation that the defect and want of necessary repair were against the form of the statute.²

¹ *Corey v. Bath*, 35 N. H. 530.

² *Read v. Chelmsford*, 16 Pick. 128.

(a) In a statutory action to recover for an injury occasioned by a defect in the double damages of a bridge corporation, bridge, it is not necessary to allege that the

plaintiff was entitled to double damages, or conclude *contra formam statuti*. But it must be averred that the corporation had reasonable notice of such defect; and the want of such averment is not cured by a verdict for the plaintiff. *Worster v. Canal*, &c. 16 Pick. 541.

A count at common law, for an injury sustained in consequence of a defect in a bridge, may be joined with a count on the statute, claiming double damages for the same injury; the form of the action being the same in both counts. *Ibid*.

In such action the declaration alleged, that the defendants were by law bound to keep the bridge in repair, but not that they were the proprietors thereof, nor that they had any interest or control over it, nor that the bridge authorized to be erected by the act incorporating the defendants was ever built, nor that the bridge mentioned in the declaration was built by the defendants by virtue of such act, nor what kind of bridge it was, nor whether it was public or private, nor that the plaintiff had any right to pass over the same; neither did it set forth or allude to the act incorporating the defendants and creating their liability to repair the bridge. After verdict, it was held that

these were merely defects in the manner of stating the liability of the defendants, and so were cured by the verdict. *Ibid*.

In the same action, the declaration contained two counts for the same injury, — the first alleging it to have been caused by a defect in the bridge, and also by a neglect on the part of the defendants to light the lamps, and the second count omitting the latter cause. The jury found that both causes were proved, and returned a general verdict for the plaintiff. It was held, that, if the first count was insufficient, judgment might be entered on the second count. *Ibid*.

In the same action the declaration alleged, that the plaintiff sustained the injury in consequence of a defect in the railing of the bridge. It appeared, that, in repairing the bridge, a portion of the footway and railing was removed, in order to allow the travel to pass from the bridge to certain land by the side of the bridge, provided by the corporation temporarily, as the common travelling path; that this land was enclosed by a fence, through an aperture in which the plaintiff passed and fell overboard. It was held that this was not a variance. *Ibid*.

CHAPTER XXXVIII.

MISCELLANEOUS RIGHTS AND LIABILITIES OF MUNICIPAL AND OTHER
SIMILAR CORPORATIONS.

1. General liability of municipal corporations.
 3. Rights and liabilities of corporations acting under express charters.

4. Form of liability, whether under the statute or at common law.
 9. Rights and liabilities of individuals acting under express charters.

§ 1. IN other connections (see *Nuisance, Master and Servant*) we have occasion to speak of the general rights and liabilities of municipal corporations. Some miscellaneous rules, chiefly though not wholly applicable to bodies of this class, may more properly be stated as supplementary to several preceding chapters.

§ 2. The general doctrine is laid down, that an action sounding in tort may be maintained against a municipal corporation; that such corporation may be liable, in an action of the case, for an act which would warrant a like action against an individual; provided that such act is done by the authority of the corporation, or of a branch of its government, authorized to act for the corporation upon the subject to which the particular act relates; or that, after the act has been done, it has been ratified by the corporation by any similar act of its officers.¹ A municipal corporation is liable for injury held to be caused by the insufficient construction of its public works.² Thus an action on the case was held to lie against the corporation of the city of New York, for injuries occasioned by the negligent and unskilful construction of a dam on the Croton River, being a part of the works built pursuant to the act for supplying the city with water (Stat. 1834, p. 451); the title to the land upon which the same was erected being vested in the corporation, pursuant to the fourteenth section of the act.³ So the city

¹ *Thayer v. Boston*, 19 Pick. 511; acc. 463. See *Mayor, &c. v. Furze*, 3 Hill, 612; *Tinker v. Russell*, 14 Pick. 279; *Wilde v. Radcliff v. Brooklyn*, 4 Comst. 195. New Orleans, 12 La. Ann. 15.

² *The Mayor, &c. v. Bailey*, 2 Denio, 433.

³ *Rochester, &c. v. City, &c.* 3 Comst. 433.

of New York was held liable for damages, caused by the breaking down of a vault, built by permission under the street; the injury being occasioned by the negligent and improper act of a contractor, who was building a sewer in the street, under a contract with the corporate authorities, in unduly piling the excavated earth, &c., over such vault.¹ And it is said, the corporation of the city of New York has no more right to erect and maintain a nuisance on its lands than a private person possesses.² So a municipal corporation, owning lands on a watercourse from three to five miles distant from the city, has no right to divert the water from the stream, to the injury of the other riparian proprietors, in sufficient quantities to supply the domestic wants of its inhabitants.³ So where the vendor of land, in his contract of sale, required the vendee to grade in front of his lot, whenever the vendor might direct, and the town council afterwards graded the street in front of such lot, sinking the street several feet; it was held, that the contract of the vendee did not bar him of his remedy for damages against the corporation, for the injuries sustained by such grading.⁴ So where the expense of altering the grade of a street was assessed by the common council of a city in an irregular and illegal manner, and the collectors enforced the assessment by seizure of property; it was held that the corporation was liable.⁵ And, in general, municipal corporations are held to be responsible to the same extent, and in the same manner, as natural persons, for the negligence or want of skill of their agents, in the construction of works for the benefit of their municipalities.⁶ Thus a municipal corporation is responsible to individuals for damages resulting from want of care or skill in their public surveyor, elected by them, by reason of which a bridge on a public highway over a canal was destroyed.⁷ So where a highway is laid out by county commissioners, and the road and a bridge are built by a city, acting through their agents, a party owning land on the stream, over which the bridge is built, may recover damages for a change in the current consequent thereon, without proving wanton negligence on the part of the city or their agents. It is sufficient if want of ordinary care in its construction be shown.⁸ So the trustees of a village, made, by

¹ *Delmonico v. New York*, 1 Sandf. 222.

² *Brower v. New York*, 3 Barb. 254.

³ *Stein v. Burden*, 24 Ala. 130.

⁴ *Akron v. McComb*, 18 Ohio, 229.

⁵ *Howell v. Buffalo*, 15 N. Y. 512.

⁶ *Ross v. Madison*, 1 Cart. 281.

⁷ *Dayton v. Pease*, 4 Ohio, N. S. 80.

⁸ *Stone v. Augusta*, 46 Maine, 127.

its charter, commissioners of highways, in respect to their functions as such, are to be regarded as the agents of the corporation, in such a form as to make the latter responsible for their acts or omissions, according to the law of master and servant.¹ So a municipal corporation was held liable for injury to a passenger in an omnibus, which broke through a defective bridge, although built according to the advice of competent engineers.² So the corporation of the city of New York is responsible for injuries resulting from the negligence of persons employed by its officers in repairing the public sewers.³ So a municipal corporation, having ordered certain grading to be done in a street and adjoining avenue, and the work being carelessly and negligently performed, is liable in damages to any one who sustains damage from such negligence and carelessness.⁴

§ 2 *a.* But, on the other hand, the general rule is stated to be, that an action does not lie against a municipal corporation for neglect of duty imposed by a general law and not by its charter, unless expressly authorized by statute;⁵ and that a municipal corporation, authorized to make ordinances for the good government of its streets and citizens, is not to be responsible for injuries arising from their neglect or violation.⁶ The general propositions are laid down, that nuisances may exist in a city without rendering it liable for the consequences; that a city is no general warrantor against the acts of individuals; and cannot be held responsible for the acts of third persons, which, under a more sagacious and efficient police, might possibly have been prevented;⁷ and that no action can be maintained against a municipal corporation, for error of judgment, where no fraud or malice is imputed.⁸ Thus it is held, that the street commissioner of the city of New York is not, in such sense, an officer or agent of the corporation, as to render it liable to an action for his neglect or refusal to perform a duty enjoined on him by an act of the legislature.⁹ So also, the city of New York is not liable for injuries done to individuals, in the exercise of its authority to direct the pitching, paving, and grading of streets.¹⁰ And where the corporation, in grading two

¹ *Conrad v. Trustees, &c.* 16 N. Y. (2 Smith) 158.

² *Weightman v. Washington*, 1 Black, 39.

³ *Lloyd v. New York*, 1 Seld. 369.

⁴ *Lacour v. New York*, 3 Duer, 406.

⁵ *State v. Burlington*, 36 Verm. 521.

⁶ *Levy v. New York*, 1 Sandf. 465. See

Vincennes v. Richards, 23 Ind. 381; *Richardson v. Brooklyn*, 34 Barb. 569.

⁷ *Howe v. New Orleans*, 12 La. Ann. 481.

⁸ *Duke v. Rome*, 20 Geo. 635.

⁹ *Altamus v. New York*, 6 Duer, 446.

¹⁰ *Wilson v. New York*, 1 Denio, 595.

public streets which formed an angle in which the plaintiff's premises were situated, raised those streets so as to prevent the water from flowing off, whereby damage ensued to the plaintiff; held, an action on the case could not be sustained.¹ So it is the duty of the persons, for whose accommodation a road subject to gates is laid, to maintain such gates, and, for a neglect to do so, such person, and not the town, is liable for injuries caused by cattle escaping upon the plaintiff's land from the land adjoining, provided they were rightfully there.² So no action lies against a city, for permitting, in the proper exercise of authority, railroad tracks on the streets, or raising the grade of streets.³ So the neglect of the authority establishing a road to prescribe its width excuses a town from liability for not opening and working it.⁴ So owners of unimproved lots, adjoining unmade streets, cannot recover damages from a town, for filling, ditching, or cutting down a street, for they are presumed to purchase with a view to a reasonable improvement. When a grade has not been established, they must exercise reasonable care and judgment in improving, with a view to a reasonable and proper grade; and the town will not be liable for injuries to their improvements by grading, if by such care the grade could have been anticipated. Though if buildings are put up on a lot in accordance with an established grade, and afterwards the grade is altered to the injury of the owner, he is entitled to compensation.⁵ So a direction to an officer to remove obstructions in a certain alley does not make the city liable for the removal of property outside the limits of the alley, though the officer believed it to be inside of those limits. And it seems, that an express direction from the city council to remove the property in question would not make the city liable; for the common council is but the agent of the city, and has no authority from the city to do unlawful acts.⁶ So an action against a municipal corporation for damages, for an injury caused by a defective covering or insufficient protection of an opening in a sidewalk, made by an owner of the soil or adjacent land, can only be maintained, upon proof of notice to the corporation of such defect, and neglect to cause it to be remedied.⁷ To charge the city, it is necessary either to prove actual notice, in

¹ *Wilson v. New York*, 1 Denio, 595.

² *Proctor v. Andover*, 42 N. H. 362.

³ *Murphy v. Chicago*, 29 Ill. 289.

⁴ *State v. Leicester*, 33 Vt. 653.

⁵ *Crawford v. Village, &c.* 7 Ohio (N. S.) 459.

⁶ *Hanvey v. Rochester*, 35 Barb. 177.

⁷ *Hart v. Brooklyn*, 36 Barb. 226.

case of defects not occasioned by their own acts, or such defects must be so notorious as to be evident to all passers.¹ So the statute, authorizing the corporation to cause common sewers, drains, and vaults to be made, confers discretionary powers as to the time and place of constructing such works; and a private action cannot therefore be maintained against the corporation, for an omission and neglect to construct a particular improvement of this kind, even though wilful. Though, for a neglect to repair existing sewers and drains, by which an individual is injured, an action lies.² So a city is not liable for failure to keep in repair a public cess-pool, whereby waste water accumulates and flows into the cellar of a neighboring house, which is not connected by a drain with the public sewer.³ So a city may connect its sewers and drainage with any natural channel for the flow of water, without incurring liability to keep that channel open to its mouth; though the State or the owners of the lots through which it passes have made an artificial and covered substitute in place of the natural channel. Occasional repairs on the sewer substituted are no evidence of a voluntary assumption of the duty of maintaining it on the part of the city. It is not a case of dedication to public use, whereby the corporation becomes bound to repair by adopting it, so that the making of the repairs becomes evidence of adoption. And the corporation is not liable for damages done to lot-owners by the falling in of the old sewer, unless caused by the negligence of its agents in connecting their sewer with the old one, or in not keeping their own sewer in order, or in bringing into the old sewer such an additional quantity of water as to gorge and break it.⁴ So a municipal corporation is not liable for the destruction of a building in order to stop the progress of a fire, except by virtue of an express statute.⁵ Nor, independently of statute, for injuries done by a mob.⁶ And, in order to charge a corporation for negligence, in the performance of a public work, the law must have imposed a duty on it, so as to make that neglect culpable. Thus the trustees of the village of Plattsburgh, when in performance of their duty as commissioners of highways, act under the several laws regulating highways, and are an independent set of officers,

¹ *Hart v. Brooklyn*, 36 Barb. 226.

² *Wilson v. New York*, 1 Dento, 595.

³ *Barry v. Lowell*, 8 Allen, 127.

⁴ *Munn v. Pittsburgh*, 40 Penn. 364.

⁵ *Correas v. San Francisco*, 1 Cal. 452.

⁶ *Prather v. Lexington*, 13 B. Mon. 559. See *Blodgett v. Syracuse*, 36 Barb. 526.

altogether beyond the control of the village corporation. Hence the village is not liable for damages sustained by an individual, in consequence of one of the streets of the village being out of repair.¹ So, although the officers of a city are appointed by a corporation, they are *quasi* civil officers of the government, and are personally liable for malfeasance or nonfeasance in office, but for neither is the corporation responsible.² Upon these grounds, where the corporation of a city, by virtue of a power granted, but not wantonly or unnecessarily, caused to be opened a ditch, sewer, or culvert within and upon the sidewalks thereof; held, that an action could not be sustained by one whose property had sustained damage in consequence of the work.³ More especially, a city is not liable to an individual for the insufficiency of its public sewers, when the damages result directly from his use or occupation of it for his private advantage and convenience.⁴ Nor for grading a street, and turning the water from a natural gully upon the land of the plaintiff, causing him great injury.⁵ So the city of St. Louis was held not liable, for digging a ditch by authorized agents, under her proper ordinances, injurious to another, if not done carelessly.⁶ So where a municipal corporation proposes to build a new bridge on the site of an old one, but on a new plan, by which back water will injure the plaintiff's mill; as the authority which the corporation attempts to exercise is of a public nature, and lawful in its character, private rights and interests are subordinate; and the loss is *damnum absque injuria*.⁷ So under the charter of the city of New York the corporation have power to establish markets, wherever, in their judgment, the interests of the city may require. And any necessary obstruction to the use of the street by adjoining proprietors, caused by necessary repairs of a market-house, is no ground for an action for a loss of profits in trade by such proprietors, and the degree of obstruction is a question for the jury.⁸ (a) So a town, which has assumed the duties of school districts, is not liable for an injury sustained by a

¹ Hickok v. Plattsburgh, 15 Barb. 427.

² Prather v. Lexington, 13 B. Mon. 559;
Stewart v. New Orleans, 9 La. Ann. 461;
Lewis v. New Orleans, 12 Ib. 190.

³ White v. Yazoo, 27 Miss. 357.

⁴ Dermont v. Detroit, 4 Mich. 435.

⁵ St. Louis v. Gurno, 12 Mis. 414.

⁶ Lambar v. St. Louis, 15 Mis. 610.

⁷ Ely v. Rochester, 26 Barb. 133.

⁸ St. John v. New York, 6 Duer, 315.

(a) As to the liability of a city for a defect in a market-place; see Baltimore v. Brannan, 14 Md. 237.

No action lies, where the injury was

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caused by the plaintiff's falling into a hole in a former market-place, which had ceased to be an authorized market. *Ibid.*

scholar, attending the public school, from a dangerous excavation in the school-house yard, owing to the negligence of the town officers.¹ More especially, where by statute a district surveyor is elected by the people, the city, not having control of such officer, is not liable for damages resulting to a land-owner from his negligence in locating the line of lots, whereby the owner was compelled to rebuild a house after it was partially erected. And it is not a duty incumbent upon cities, in their corporate capacity, to provide for the survey of lots. Nor are they responsible for the negligence or unskilfulness of the surveyor employed.² (a)

§ 3. A very frequent form, of the alleged liability of a corporation for tort or wrong, is found in the case of a charter, granted for some specific purpose of public or private improvement, and involving the doing of certain acts connected with individual property, by the neglect or improper performance of which such property is injured. A corporation, formed for private emolument, though incidentally beneficial to the public, is not so far a public body as to entitle it to the exemptions of a servant of the State.³ Thus one injured by the decay of sea-walls, which a corporation is directed to repair, under a grant from the crown, conveying a borough, and pier or quay, with tolls, to the corporation, may sue the corporation for damages.⁴

§ 4. Although the statute itself prescribe a remedy for parties

¹ Bigelow v. Randolph, 14 Gray, 541.

² Alcorn v. Philadelphia, 44 Penn. 348.

³ Tinsman v. Belvidere, &c. 2 Dutch.

148.

⁴ Henly v. Mayor, &c. 4 Bing. 91.

(a) The default or neglect in taking a replevin bond, which makes a constable liable, is the criterion also of the liability of the town for him. Bank, &c. v. Rutland, 33 Verm. 414.

Under the Street Improvement Statute, and an agreement in this case between the city and the contractor which followed the statute, the contractor was to be paid only from the money collected by assessment upon the abutters; the city, by the statute, were required not only to lay the assessment, but also to use due diligence to make it productive. The city laid the assessment, issued a warrant to the collector, who duly advertised and offered the lands at auction according to the statute, which provided that they should be struck off to the bidder who would pay the amount due, and take the land for the least number of years. Some lots were struck off to *bond fide* pur-

chasers, and the money realized was properly applied; no one bid on the other lots, and they were struck off to the contractor; neither he nor the assignees of his claim were present, or had authorized any bid on their behalf; the officer afterwards notified them, and offered to make them a deed, upon payment by them of the amount due by indorsement thereof on the engineer's certificate. In a suit against the city for alleged negligence in not collecting the assessment, it was held, that the city, having advertised for twelve weeks, had performed its duty; and that although, upon non-payment by the contractor for the lots sold by him, the city might have resold them, it was not bound to do so, especially as the contractor or his assignees might have taken the deed and availed themselves of any advantage to be expected from a resale. Richardson v. Brooklyn, 34 Barb. 569.

injured, yet a common-law liability may arise, upon which an action on the case may be maintained. (See chap. 3.) Thus an act of parliament constituted a company, for the purpose of making and maintaining a navigable canal, which all persons were to be allowed to use on payment of certain tolls. The act also provided, in case of obstruction by any sunken vessel, the owners of which should not weigh it up without loss of time, that it should be lawful for the company to do so, and to keep the same till payment made of the expenses for so doing. Held, the act did not make it compulsory upon the company, after notice, so to weigh up a sunken vessel; but, as the company had made the canal for their profit, and opened it to the public upon payment of tolls, a duty was imposed on them, at common law, to take reasonable care to prevent danger to the navigation; and therefore they were liable in case, for neither weighing up nor giving notice of a sunken vessel, which damaged a boat navigating their canal. Also, that such duty need not be expressly alleged; but only facts from which the duty can be necessarily implied.¹

§ 5. So the provisional committee of a water-works company agreed with the plaintiff, on his withdrawing his opposition to their bill in parliament, to purchase lands for the works at a fixed sum per acre, including damage for severance, and, in addition, to pay for any damage the plaintiff should sustain, from the water of the company being near his house or buildings, and also to make good to the plaintiff or his tenants all loss or damage to any property belonging to or in the occupation of him or them, which the company might not purchase (except damage occasioned by severance), whether caused by the order or neglect of the company; the damage to be assessed by certain arbitrators. The local act was obtained, and it incorporated the Lands Clauses Consolidation Act, 1845, and the purchase-money was paid, and the compensation-money under the above heads was ascertained by the arbitrators, and paid to the plaintiff. The plaintiff subsequently brought an action against the company, for taking so little care of a reservoir, that the water oozed out over the plaintiff's land, causing offensive smells and vapors, and rendering his buildings damp and unwholesome, and permanently injuring them, and for obstructing a drain and thereby penning back the sewerage of the plaintiff's house; and, further, because a drain, whereby the plain-

¹ *Lancaster, &c. v. Parnaby*, 3 P. & D. 162.

tiff's adjoining house and lands were drained, was interrupted and rendered useless, and the defendants neglected to substitute another drain according to their duty, whereby the plaintiff's house and lands were insufficiently drained; and also, for cutting a channel across, and thereby, and also by means of the defendant's reservoir and works, depriving the plaintiff of the use of an agricultural road, forming a communication between lands of the plaintiff, and for not substituting another road in lieu of it; and also, by the reservoir and works obstructing a public foot-path and depriving the plaintiff of the use of it, and thereby causing him particular damage and inconvenience. Held, that the action was maintainable, the damages not being those directed by the act to be settled by arbitration, or such as were contemplated by, or within the scope of, the agreement. So, although the defendants had no notice that the interrupted drain was for the drainage of the plaintiff's house, or that the plaintiff required any substituted drain; and although the plaintiff had not required any way to be substituted for the occupation road. But that a claim for raising the level of a stream, so as to check its accustomed speed at the place where it arrived at the plaintiff's lands, might be a loss included in the arbitration; and that a plea of an award of a certain sum therefor was good in part, although it professed to cover some of the other claims, to which it was no answer.¹

§ 6. But, in general, the remedy prescribed by the statute is held to be exclusive. Thus, in 1793, a corporation was created, with power to make a navigable canal from Merrimack River to Medford, and for that purpose to appropriate private property; and, in order that no person might be damaged by their diverting watercourses or flowing his land, a special mode was pointed out, for ascertaining and securing payment of such damages: — the corporation to take a prescribed toll; and if, in ten years, it should not be completed so far as to be passable, the act to be void. By two subsequent acts, the corporation were authorized to continue the canal to Charles River; and, within the time last fixed, the canal was opened to public use and the toll taken. The corporation had erected a dam across a river, to form a feeder for the canal, and, after the canal had been open for more than twenty years, erected a new dam, just below the first one, but to a greater

¹ *Cawkwell v. Russell*, 38 Eng. L. & Eq. 351.

height, by which lands were overflowed and damaged. Held, there was no limitation of time for exercising the power to use the river for the necessary supply of the canal; that such limitation could not by necessary implication be deemed to have taken effect when the canal was first opened, because the necessity did not then cease; and, if the like power was necessary to the continued use of the canal, as it was originally made or had since been made, without objection on the part of any person interested, the power also must continue, and of the public necessity and expediency of using this power, the corporation were constituted the judge; and, consequently, that the owner must pursue his statutory remedy, and could not maintain an action at common law.¹

§ 7. But, in order to charge a corporation for negligence in the performance of a public work, the law must have *actually*, not merely in form, imposed a duty or conferred an authority to do such work. Hence, where the officers and agents of a city corporation assumed to build a bridge, under the authority of a statute not constitutionally passed for want of a two-thirds vote, and the bridge fell in consequence of the negligent construction thereof; held, the corporation was not liable to an action at the suit of a person injured by the accident.²

§ 8. A canal act provided, that the canal company should not be entitled, on purchasing lands for making a canal, to any coal-mines, &c., under the same; but that such mines should belong to the same persons as would have been entitled to them if the act had not been made; but it required the owners to give notice to the company of their intention to work their mines within ten yards of the canal; and that the company might inspect the mines, and might stop the further working of them, paying compensation to the owners. Held, that the right of the owners to work within the ten yards was left as before the act, if, after notice given by them to the company, the latter did not purchase out their rights, and that, the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal-owner for such injury, which happened by the default of the company in not purchasing.³ Otherwise, where the canal act provided, that, in working such mines, no

¹ Sudbury, &c. v. Middlesex, &c. 23 Pick. 36.

² Mayor, &c. v. Cunliff, 2 Comst. 165.

³ Wyrley, &c. v. Bradley, 7 E. 368

injury should be done to the canal.¹ Or where the house of one claiming under a grant from the owner of the soil was undermined by him.²

§ 9. In the same connection, we may refer to the rights and liabilities of *individuals*, in reference to injuries done to private property, by means of acts which they are authorized by statute to perform. The privilege and duty created by such statute are analogous to those growing out of a corporate charter.

§ 9 a. One question in relation to this subject has been, whether such liability is joint or several. Thus where, by statute, the inhabitants of the hundred were to make satisfaction for damages occasioned by the acts therein mentioned; held the action must be against all the inhabitants.³ But, by a turnpike act, trustees were appointed, with authority to cut drains in lands adjoining the roads, making reasonable satisfaction to the owners thereof. It was also provided, that all actions, for anything done in pursuance of the act, should be brought within six months after the doing the thing complained of. A drain was cut, by an order signed by a competent number of trustees, and according to the plan of a surveyor, in land adjoining the plaintiff's, by which the latter was overflowed; and an action was brought against one of the trustees only, more than six months after the act done, and the first injury sustained; but within six months after a subsequent injury accrued. Held, that the action, if it could have been supported at all, was well brought against the defendant only; but that the trustees, having acted to the best of their skill, and with the best advice, were not answerable.⁴

§ 10. By the general turnpike act, the trustees of roads were authorized to divert, shorten, alter, or improve the course or path of any roads through or over any commons or waste grounds, or uncultivated lands, without making satisfaction for the same; and through or over any private lands, tendering or making satisfaction to the owners thereof and persons interested therein, for the damage sustained thereby. Held, that the trustees were authorized to lower hills and raise hollows; and were not liable to an action for a consequential injury resulting therefrom.⁵

§ 11. By a local act (3 & 4 Vict. c. 55), commissioners were

¹ Wyrley, &c. v. Bradley, 7 E. 368.

² Earl of Lonsdale's case, cited Ib. 371.

³ Jackson v. Pearson, 1 B. & C. 304.

⁴ Sutton v. Clarke, 1 Marsh. 429.

⁵ Boulton v. Crowther, 2 B. & C. 703.

appointed for improving a navigation ; all their powers to be executed by the majority present at a meeting of not fewer than three. They were not to be personally liable on contracts made, or for damages incurred, in relation to anything done in pursuance of the act, but might be sued in the name of their clerk. The commissioners, at a meeting duly held (November 12), resolved to accept a tender for executing works in pursuance of the act ; and their clerk thereupon drew up a contract according to the tender ; and it was afterwards (December 4) signed by the contractor. It purported to be made by A, B, and C, "being three of the commissioners" appointed for putting the act in execution, and recited the previous resolution ; but it did not appear (unless as before mentioned) that the contract was executed or sanctioned by the majority of a regular meeting. Held, that the contract, made in consequence of the above resolution, was a contract entered into by the commissioners in execution of their office ; and that they were liable, and might be sued in the name of their clerk, for damage negligently done by the contractor to third persons in execution of such contract. But where the contractor, in executing part of the work, the diversion of a creek, made a drain, which, from a defect in the materials, could not resist water ; and, without authority, turned in the water, which broke through and flooded the neighboring land ; and the drain was not finished at the time, but it did not appear that anything further was about to be done for the purpose of securing it, if the mischief had not happened : it was held, that the defendant was not liable.¹

§ 12. By one clause of a local improvement act, power was given to commissioners "to cause the present and future streets, &c., and other public places to be paved, &c., and the ground or soil thereof to be raised, lowered, or altered, from time to time, and in such manner as they should think fit." By other clauses, the commissioners were authorized to give notice to the owners or occupiers of houses situate in streets built upon, but not paved or flagged, requiring them to pave and flag the same, and, in case of their neglecting to do so, to pave and flag the same, and to recover the expenses from the owners or occupiers, and to declare the streets highways, and take upon themselves the future paving

¹ *Allen v. Hayward*, 7 Ad. & Ell. N. S. 960.

of them; but not to alter the level of the streets. Held, they were not authorized to cut down a steep ascent, and greatly lower the level of the street opposite the plaintiff's house, but were liable in trespass.¹

§ 13. A statute, for making certain rivers navigable, gave the undertakers power to make new cuts, &c., for the purpose of improving the navigation, but required them to make compensation to the land-owners, according to the determination of commissioners, or agreement between the parties; but gave the undertakers no power to purchase lands, nor recognized in them any right of the soil in the beds or banks of the rivers. A river, mentioned in this act, was made navigable by certain undertakers, and their successors exercised for a long series of years various acts of ownership and enjoyment of the banks, by cutting bushes, &c., and granted a lease of hatches and sluices made in one of the banks to an occupier of land adjoining thereto, for the purpose of irrigation; but there was no proof of any agreement between the undertakers and the original proprietors of the land for the purchase of the soil of the bank. Held, such an agreement could not be presumed from these acts of ownership, when opposed to similar acts exercised by the occupier of the adjoining land; and that the act of parliament afforded strong evidence against such presumption. Also, that evidence of acts of ownership and enjoyment, exercised by the undertakers on other parts of the line of the navigation, was inadmissible, to show their title to the *locus in quo*, unless unity of title and character, between the *locus in quo* and the other parts of the line of navigation, was previously established.²

¹ *Brown v. Clegg*, 6 Eng. L. & Eq. 334.

² *Hollis v. Goldfinch*, 2 Dowl. & Ry. 316.

CHAPTER XXXIX.

OFFICERS, ETC. OF CORPORATIONS.

§ 1. THE *officers* or *agents* of a corporation may be liable, for wrongs committed by them as such; (a) even though the company is itself responsible. Thus an act, providing that a town shall be liable for all illegal doings and defaults of one of its officers, does not necessarily exempt the officer himself from liability.¹ So a suit may be maintained against officers of a corporation, jointly, for the fraudulent over-issue of stock, by any stockholder injured thereby, through the depreciation of his stock. The remedy is not limited to a suit against the seller of the stock.² And it is no answer to an action of trover for bank-notes, that the defendant, as cashier of the bank, received them on special deposit.³

§ 2. But, in general, an action does not lie against individuals for acts done by them in a corporate capacity; at least, not without proof of malice.⁴ And if an individual stockholder has suffered damage, in a contract with the corporation, through the fraudulent and illegal acts of the directors, done by color of their office, his only remedy is against the corporation. He can maintain no action against the directors, who are themselves liable to the corporation.⁵

¹ *Rounds v. Mansfield*, 38 Maine, 586.

² *Cazeaux v. Mali*, 25 Barb. 578. See *Granesutine's, &c.* 49 Penn. 310.

³ *Coffin v. Anderson*, 4 Blackf. 395.

⁴ *Harman v. Tappenden*, 1 E. 555.

⁵ *Smith v. Poor*, 40 Maine, 415. See *Mayor, &c. v. Eschbach*, 18 Md. 276; *Livermore v. Freeholders, &c.* 5 Dutch. 245.

(a) Officers and directors of a corporation cannot without fraud secure to themselves advantages not common to the stockholders. *Kehler v. Iron Co.* 2 Black, 715.

In case of trust, the officer of a corporation may be held to strict responsibility for its performance, notwithstanding contrary directions from the corporation itself. *Wilkinson v. Stewart*, 30 Ill. 48; *Thompson v. Township, &c.* 30 Ill. 99.

An action lies against the *members* of a corporation, by their private names, for a

false return to a *mandamus* by their corporate name. *King v. Rippon*, 1 Com. 86.

In New York, where trustees of an unincorporated company, with others of the company, wrongfully and fraudulently convert property of the company, the other members can maintain an action against them all together for the value of the property; although it is averred that the defendants did not faithfully discharge their trust. *Dennis v. Kennedy*, 19 Barb. 517.

Thus a stockholder in a bank cannot maintain an action against its directors, for their negligence in so conducting its affairs, that its whole capital is wasted and lost, and the shares therein rendered worthless; nor for the malfeasance of its directors in delegating the whole control of its affairs to the president and cashier, who waste and lose the whole capital.¹

§ 8. While a claim may be made against officers of a corporation by third persons, the officer or agent of a corporation is also liable to the corporation for all damages occasioned by the violation of his duties and obligations; and, for the most part, as has been stated, only to the corporation, not to the stockholders;² the remedy of the latter being against the corporation itself.³ (a) In general, the officers and agents of a corporation are liable for losses and defalcations caused by *neglect*, or the want of reasonable care and diligence.⁴ Thus the officers of a bank are agents of the corporation, and are liable for an abuse of their trust, wherever the agents of an individual would be.⁵ So, where an owner of a bill indorses it, and sends it to a bank for collection; the bank, having a special interest in it and in the proceeds thereof, can sustain an action against such agent as it may employ to collect it, for omitting to pay over the proceeds, or for default in charging the parties.⁶ So the payment of overdrafts, by a cashier appointed to keep money and pay it to the checks of persons entitled to draw, is, without some special excuse, a violation of duty.⁷ So, where the treasurer of a corporation obtains permission to borrow the funds in his hands, upon giving his note with a mortgage, and he gives his

¹ *Smith v. Hurd*, 12 Met. 371.

² *Bayless v. Orne*, 1 Freem. 175; *Franklin, &c. v. Jenkins*, 3 Wend. 130.

³ *French v. Fuller*, 23 Pick. 108; *Brown v. Vandyke*, 4 Halst. Ch. 795.

⁴ *Percy v. Millaudon*, 3 Louis. 568;

Scott v. Depeyster, 1 Edw. 513; *Pontchartrain, &c. v. Paulding*, 11 Louis. 41.

⁵ *Austin v. Daniels*, 4 Denio, 299.

⁶ *Commercial, &c. v. Union, &c.* 1 Kern. 203.

⁷ *Bank, &c. v. Calder*, 3 Strobb. 403.

(a) The action of the officers of an incorporated company, without any violation of the charter or constitution of the company, cannot be disregarded or controlled by any court, at the instance of a stockholder, unless it is shown to have been a wilful abuse of their discretion, or the result of bad faith, or of a wilful neglect or breach of a known duty. Managers of corporations, clothed with an enlarged discretion in regard to the management of its affairs, stipulate with the stockholders for no more than good faith and reasonable diligence; and mere errors of judgment on

the part of such managers, do not entitle a stockholder to relief in a court of chancery. *Smith v. Prattville, &c.* 29 Ala. 503.

But in equity, although the corporation may proceed against the officers or agents for misapplication of the funds, yet, if the directors collusively refuse thus to proceed, or if the parties in fault still control the company, and in cases of breach of trust, the parties in interest may proceed in their own names, making the corporation a defendant. *Robinson v. Smith*, 3 Paige, 233; 1 Freem. 173; 4 Halst. Ch. 795. See *Scott v. Depeyster*, 1 Edw. 513.

note for them without the mortgage, he is not exonerated from liability as treasurer for the amount.¹ So, although the general agent of a company is not responsible for bad debts, or for the negligence or faithlessness of agents necessarily employed by him, yet it is his duty to see that the debts to the company are collected, and he must show that he exercised ordinary diligence for that purpose.² So where the officers of a bank purchase State stocks, to carry on a private undertaking, and sign a contract, obliging the bank to pay for the same, and then take money from the bank, to fulfil such engagement; they are liable for the money so taken to the receiver of the bank. And the assent of the president, who was the financial officer of the bank, does not protect the cashier from his liability to the bank.³ (a)

§ 4. But officers of a corporation are not liable for mere *mistake*.⁴ So directors of a bank are not responsible for an injury to the bank, caused by their act, originating in an *error of judgment*, unless the act be so grossly wrong as to warrant the imputation of fraud, or the want of the necessary knowledge for the performance of the duty assumed by them on accepting the agency. And giving compensation to a member of the board of directors, for extra services as an agent of the bank, though unlawful, is not such an act as will expose the directory to liability, if done in good faith, and with the honest intent of benefiting the bank.⁵

¹ Bluehill, &c. v. Ellis, 32 Maine, 260.

² Williams v. Gregg, 2 Strobb. Eq. 297.

³ Austin v. Daniels, 4 Denio, 299.

⁴ 1 Edw. 513; 3 Louis. 568; 11 ib. 41.

See Reed v. Conway, 26 Mis. 13.

⁵ Godbold v. Bank, &c. 11 Ala. 191.

(a) A *public officer*, who holds securities deposited with him by a bank, is not liable to the bank for embezzling them, unless the bank suffers pecuniarily by his act. *State v. Dunn*, 10 Ind. 269.

CHAPTER XL.

MASTER AND SERVANT; PRINCIPAL AND AGENT.

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| 1. Whether master and servant are <i>jointly</i> liable. | 18. Liability for fraud of an agent or servant. |
| 3. General liability of a master or principal—for wilful wrongs of the servant—trespass. | 20. Liability of a servant—to third persons. |
| 5. Liability for negligence of the servant. | 22. To the master. |
| 11. Distinction between a <i>servant</i> and a <i>contractor</i> ; case of <i>Bush v. Steinman</i> . | 24. Liability of master to servant. |
| 16. Liability of public officers. | 27. Actions by master and servant against third persons. |
| 17. Of corporations, &c. | 28. Action by master for loss of service of the servant, &c. |

§ 1. In immediate connection with the subject of *joint* claims and liabilities, may be considered those which grow out of the common and familiar relation of *master and servant*, or *principal and agent*.

§ 2. It has been sometimes held, that master and servant may be joined as defendants in one action. As in an action for personal injuries caused by the negligence of a son, while driving the horses of his father.¹ So, in an action on the case for obstructing the plaintiff's lights, a clerk who superintended the erection of the buildings by which they were darkened, and who alone directed the workmen, may be joined as a co-defendant with the original contractor.² So a joint action of tort, in the nature of trespass, may be maintained against a corporation and its servant, for a personal injury inflicted by the latter in discharging the duties imposed on him by the corporation, although they might have been equally well discharged without the use of illegal or undue force.³ So a railroad company, authorizing the blasting of rocks by its contractors upon the proposed line of its road, is liable as joint wrong-doer with the contractors, for any damage done by fragments of stone to adjoining premises, although there was no want of care in the manner in which the work was done.⁴ And more especially

¹ *Phelps v. Wait*, 30 N. Y. (3 Tiff.)

² *Hewett v. Swift*, 3 Allen, 430.

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⁴ *Carman v. Steubenville, &c.* 4 Ohio,

³ *Wilson v. Peto*, 6 Moore, 47.

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may the injury be regarded as joint, where by agreement between the parties they are to be jointly interested in the property which is the subject of such injury. Thus, where A's negroes were purchased from a third person by B, on the joint account of himself and C; and, after notice of A's title, B sold the negroes for the benefit of himself and C; it was held, in trover by A against C, that the sale by B was a conversion by both B and C.¹ So it has been held that the sheriff is jointly liable with his deputy, though not present at the taking of the property.² (See *Sheriff*.) More especially, that a sheriff, who ratifies the wrongful act of his deputy, is liable to be sued with the latter as a joint trespasser.³ But case for deceit, in the nature of a conspiracy, cannot be sustained against a principal and his agent jointly, for the unauthorized fraudulent acts and *representations of the agent alone*. Such action can be sustained, only where some affirmation or representation, wilfully false, or some designed and positively fraudulent artifice, is directly proved, or necessarily to be presumed from the circumstances attending the transaction itself, to have been made or perpetrated by the defendants jointly, by means whereof a damage resulted to the plaintiff.⁴ So an action on the case does not lie against a master and servant jointly, for a wilful injury done by the servant, whilst driving the carriage of the master, if such carriage be not employed in the conveyance of passengers, and the master be not present when the injury occurs.⁵ And when master and servant are joined, and joint negligence is the only foundation of the action, if the servant is acquitted, there can be no recovery against the master.⁶

§ 2 a. It is to be further remarked, that in some cases a party may *elect*, whether to proceed against the master or the servant. As where money is paid to a servant, and he misapplies it.⁷ And a party injured may sometimes proceed against the master and servant *successively*; and the latter has been held to be concluded and estopped by the result of proceedings against the former. Thus where, in an action of trover, the defendant justifies the taking by the command and under title of one A, he is to be regarded as a privy of A; and the record of a former recovery by

¹ *Guerry v. Kerton*, 2 Rich. 507.

² *King v. Orser*, 4 Duer, 431.

³ *Waterbury v. Westervelt*, 5 Seld. 598. 591.

⁴ *Page v. Parker*, 40 N. H. 47.

⁵ *Wright v. Wilcox*, 19 Wend. 343.

⁶ *Montfort v. Hughes*, 3 E. D. Smith,

⁷ *Cary v. Webster*, 1 Str. 480.

the plaintiff against A for the same taking is admissible in evidence against the defendant; and is conclusive as to the plaintiff's title and right of possession.¹ And, on the other hand, in an action for a trespass, committed by the defendant, as servant and by command of A, acceptance of satisfaction by the plaintiff from A is a defence.² In general, however, different forms of action are adopted against master and servant. Thus an action on the case, and not an action of trespass, is the proper remedy for an injury done to the plaintiff's carriage, by the servant of the defendant negligently driving his carriage against it.³ (a)

§ 8. The rule of liability against a master, for the act of the servant, is held to be the same precisely, whether the servant is employed in the care and management of real or personal property; except perhaps in the single instance, where the act complained of, in respect to real estate, amounts to a nuisance.⁴ In general, a master is liable for the *fault* or *negligence* of his servant; (b) but not for his *wilful*, *designed*, *intentional*, or *criminal injury*, *wrong*, or *trespass*; ⁵ (c) or an act of wanton or thoughtless

¹ *Calkins v. Allerton*, 3 Barb. 171.

² *Thurman v. Wild*, 11 Ad. & Ell. 453.

³ *Morley v. Gaisford*, 2 H. Black. 442.

⁴ *Simons v. Monier*, 29 Barb. 419.

⁵ *Jones v. Hart*, 2 Salk. 440; *M'Guire v. Grant*, 1 Dutch. 356; *Coleman v. Riches*,

16 Com. B. 104, 29 Eng. L. & Eq. 323; *Mitchell v. Mims*, 8 Tex. 6; *Fergusons v. Terry*, 1 B. Mon. 96; *Brooks v. Olmstead*, 17 Penn. 24; *Grant v. Norway*, 10 Com. B. 665; *Hubbersty v. Ward*, 8 Exch. 330; *Wesson v. Seaboard, &c.* 4 Jones, 379.

(a) See *Trespass; Action on the Case*; *Supra*, Chap. 3.

(b) More especially is the master liable, if himself guilty of the negligence which causes the injury. Thus a master is liable for an accident resulting from the breaking of the chain-stay of a cart driven by his servant, on account of his negligence in not having the tackle good. *Welsh v. Lawrence*, 2 Chitty, 262.

(c) Case is an appropriate remedy for injuries caused by the wrongful acts of a servant of the defendant, even though such acts have been acts of force, and such that trespass would have been the only proper remedy against the servant. *Havens v. Hartford, &c.* 28 Conn. 69.

Thus a master is held not liable in trespass for the wilful act of his servant by driving his master's carriage against another, done without the direction or assent of the master. *M'Manus v. Crickett*, 1 E. 106. (For a criticism upon this case, see Redf. on Railw. 381, n.)

If a servant, while felling trees by the orders of his master, and in the scope of

his business, trespass upon another's land, either wilfully or negligently, the master is liable. *Luttrell v. Hazen*, 3 Sneed, 20.

A railroad is liable for the torts of its agent, while engaged in the performance of his duties, but not for his wilful or criminal acts. *DeCamp v. Mississippi, &c.* 12 Iowa, 348.

Trover lies against a master, for goods delivered to his apprentice, and wrongfully converted by him. *Armory v. Delamirie*, 1 Stra. 505.

In reference to the peculiar nature of the master's liability, for injuries caused by the driving of animals and the use of carriages, and the distinction between the actions of trespass and case, as applied to this class of injuries, it is said: "Liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass, unless the act was done by his command; that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which

mischief, done by a servant who is not at the time engaged on the master's business.¹ The injury must arise in the course of the execution of some service lawful in itself, but negligently or unskilfully performed; and not be a wanton violation of law by the servant, although occupied about the business of his employer.² It must appear, either that the master commanded the unlawful act, or that the injury resulted from the negligence of the servant, while he was actually employed in his master's service.³ Or that the injury was the natural and probable result of the orders given to the servant.⁴ Thus the owners of a tow-boat are liable for all damages occasioned by the negligence of their agent who has charge of the boat, where the parties have not agreed to the contrary.⁵ So the owner of a house gave a general direction to his servant, to clear the snow from the roof, which was done by throwing it into the street, whereby a man was killed. In an action under the statute for damages resulting from the death, held, the act was dangerous to human life and grossly negligent, and, as the master had intrusted the performance of the service to the servant, he was responsible for the manner in which the service was performed, either by the servant or by a person whom he had employed to assist him.⁶ But, on the other hand, a steamboat of the plaintiffs took fire in the night, while fastened by the plaintiffs' cable to the defendants' wharf, upon which stood an old wooden freight-house; but, before the house was in danger, and while the

¹ *Weldon v. Harlem*, &c. 5 Bosw. 576; *Snodgrass v. Bradley*, 2 Grant, 43.

² *Moore v. Sanborne*, 2 Mich. 519.

³ *Douglas v. Stephens*, 18 Mis. 362.

⁴ *Thames, &c. v. Housatonic*, &c. 24 Conn. 40.

⁵ *Ashmore v. Pennsylvania*, &c. 4 Dutch. 180.

⁶ *Althof v. Wolf*, 2 Hilt. 344.

comprises it; or some act which leads by a physical necessity to the act complained of. But when the act is that of the servant in performing his duty to his master, the rule of law we consider to be, that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master are placed in the care and under the management of a servant or rational agent. In all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent." *Sharrod v. London*, &c. 4 Exch. 580.

The plaintiff's horse, in charge of his servant, who was guilty of no negligence, was killed by reason of a span of horses, belonging to the defendant, which had run away with his coachman, running against a feed wagon. Held, although the defendant's servant was guilty of no fault or negligence, yet the defendant was liable, if the servant caused the injury by running against the wagon, though solely with a view to his personal safety, provided the act was a prudent one for the purpose of stopping the defendant's horses. *Wolfe v. Mersereau*, 4 Duer, 473. See *Barnes v. Hurd*, 11 Mass. 57; *Gates v. Miles*, 3 Conn. 64; *Adams v. Hemmenway*, 1 Mass. 145.

master, where, while the servant drives him in a gig, the horse runs away and does damage.¹ So the defendant and others hired for a day's excursion a carriage and post-horses, driven by postilions, who were the servants of the owner of the horses.¹ The defendant rode upon the box. The postilions, in endeavoring to force their way into a line of carriages, overturned a gig, and injured the plaintiff. The defendant, at the time and afterwards, held himself out as responsible for the accident, and used expressions showing that he had a control over the postilions at the time it happened. Held, that he was liable in trespass.² And, under similar circumstances, an action on the case may also be maintained. Thus A borrowed of the plaintiff a horse and chaise, and went in it, accompanied by B, on an excursion of pleasure, B driving. By B's mismanagement, the horse and chaise were driven against and injured the plaintiff's horse. Held, that an action on the case might be maintained for the injury against A, on a declaration charging that he was possessed of and driving the horse and chaise, and that by his negligent driving the injury was occasioned.³

§ 4 a. But the owner of a dog is not liable for his servant's setting the dog on cattle, though the master stood near, unless done by his command; more especially if he called off the dog, as soon as he was informed of the act.⁴

§ 4 b. And it is to be observed, in reference to the proof of authority to do a wrongful act, that, where it is sought to charge A for the wrongful act of B, done at his request and by his direction, it is not competent to inquire of B, whether he would have done the injury had he not *understood* from A that he would pay the damage, and whether he did the act with the understanding from A that he would pay the damage. The understanding of B can be learned only from the transaction itself, including what was said between A and B in relation to it, and all the accompanying circumstances. It is to be inferred from such evidence, and the inference belongs exclusively to the Court. And it is at least necessary, in order to charge A, that he said and did what would amount to a request or direction; and from which it might be inferred that it was so understood both by A and B.⁵

¹ *Chandler v. Broughton*, 3 Tyr. 220.

² *M'Laughlin v. Pryor*, 4 M. & Gr. 48.

³ *Wheatley v. Patrick*, 2 M. & W. 650.

⁴ *Steele v. Smith*, 3 E. D. Smith, 321.

⁵ *Rich v. Jakway*, 18 Barb. 357.

§ 5. With regard to that class of wrongs for which, as above explained, a master is responsible, it is said, the legal maxim, *respondet superior*, is bottomed on this principle, that he who expects to derive advantage from an act, which is done by another for him, must answer for any injury which a third person may sustain from it.¹ That where either party to a transaction made with an agent is to suffer by his neglect, it should be his principal.² Hence a master is liable for the act of his servant, done in the course of his employment about his master's business.³ But not for the act of his free servant done outside of his employment.⁴ The test of the principal's liability for the tortious acts of his agent is, was he or not, at the time when the act complained of was done, in the course of the master's service.⁵ Thus the owner of a lot of land, occupied by his servant, directed him to *summer-fallow* a part of it, and, in order to prepare the land for the plough, the servant cut down and placed in piles, on one side, the brush growing upon the premises, and then, at a time of unprecedented drought, when the act was negligent in itself, directed his son, a lad, to set fire to the brush-heaps, which he did, and thereby fire was communicated to the plaintiff's woods. Held, the removal of the brush was within the scope of the servant's employment, the act of firing was the act of the servant, and the master was liable.⁶ (a) But though, if the servant be in the performance of, and intrusted with, the ordinary business of his master, the master is chargeable in trover for a wrongful conver-

¹ Per Best, C. J., *Hall v. Smith*, 2 Bing. 160.

² *Nicoll v. American, &c.* 3 W. & M. 529.

³ *Priester v. Augley*, 5 Rich. 44.

⁴ *McClenaghan v. Brock*, 5 Rich. 17.

⁵ *Echols v. Dodd*, 20 Tex. 190.

⁶ *Simons v. Monier*, 29 Barb. 419.

(a) The following case is reported in a newspaper:

Supreme Court, New York — *Carman et al. v. The Mayor, &c.* — Action for negligence on the part of agents. The complaint alleges, that the plaintiffs are the owners of certain lands adjoining the Croton Aqueduct lands, belonging to the Corporation. On their land were seven large fruit-trees, in a parallel, or nearly parallel line, of the Croton Aqueduct land, on which, also, were similar fruit-trees; that the defendants instructed certain laborers to cut down and clear the Croton Aqueduct lands of all such trees thereon; and that, in consequence of the carelessness of such laborers, and the negligence of the Corporation in not having persons familiar with the boundary lines between the lands, to superintend

the work, the plaintiff's trees were also cut down and removed. On demurrer, held, the city was liable. The servants committed the act in the course of their employment, ignorantly, under the supposition that they were on the land of the defendants. A proper precaution on the part of the defendants would have prevented the injury. It was plainly the duty of the defendants to have given such instructions to their laborers, as would have enabled them to discriminate between the property or trees of the city and those of the plaintiffs. Had the defendants supposed the trees to be their own, and directed them to be cut down, they would certainly be liable. It is not less an act of culpable negligence, that they failed to give such directions as would have caused the injury to be avoided.

sion by the servant; the mere fact that he was the servant of the defendant is not sufficient to charge him.¹

§ 5 a. In case of the master's liability, the act is treated as virtually that of the master himself, and may be so alleged. Thus, in an action for negligently driving a cart against the plaintiff's carriage, it may be stated in the declaration as the act of the master, though in fact it be the act of the servant.² Upon the same principle, where the declaration states, that, whilst the plaintiff was crossing a certain street, the defendants, by their servant, negligently drove and injured the plaintiff; the defendants, under not guilty, may show that the driver was not acting as their servant.³ But where an action cannot be maintained against a party, unless there has been *personal negligence* on his part, it is not enough to show that he has ordered work to be done, not necessarily amounting to a nuisance, nor causing injury, but in the course of which an injury is accidentally inflicted, although he did not give any special direction to adopt a particular precaution which might have prevented it; for it must be taken that he gave general directions to do the work in a proper manner, and to adopt all proper precautions; and the neglect of any such precaution, even assuming it to be negligence, which might, under ordinary circumstances, render the employer legally liable, is not his *personal* negligence; so that he would be liable for an injury sustained in such a case by one of his own workmen, or in a case in which a statutory defence was raised, on the ground that there was no negligence on the part of the defendant "otherwise than by his servants or workmen."⁴ And the rule *respondere superior* does not apply to a mere *statutory* liability. Thus a master is not liable, under the Massachusetts Rev. Stats. c. 51, § 3, for the damages sustained by any party, by reason of the omission of his servant seasonably to drive the master's vehicle to the right of the middle of the travelled part of a road, when meeting another vehicle.⁵ See p. 480, n.

§ 6. It is not necessary that there should be any express assent or agreement on the part of the master, in the particular transaction brought in question, in order to charge him for the act of the servant. Thus "for the acts of a man's own domestic

¹ Arthur v. Balch, 3 Fost. 157.

² Brucker v. Fromont, 6 T. R. 659.

³ Mitchell v. Crassweller, 16 Eng. L. & Eq. 448.

⁴ Scott v. Mayor, &c. 38 Eng. L. & Eq.

477.

⁵ Goodhue v. Dix, 2 Gray, 181.

servants there is no doubt but the law makes him responsible.”¹ And “where an agent or servant without any prior authority, performs a needful act, which it was for the manifest benefit of his principal or master should be performed, the assent and authority of such principal or master to the performance of the act will be implied.”² So where the plaintiff, *according to the common course of dealing*, delivers to the defendant’s servant an ingot of gold to assay; if it is not returned, he may bring trover against the master, after a demand and refusal.³ So where a person occasionally employed by the defendant as his servant, being sent out by him on his business, takes the horse of another person, in whose service he also worked, and, in going, rides over the plaintiff; it is a question for the jury, whether the horse was taken by the servant with the implied consent or authority of the defendant; in which case the defendant is liable.⁴ And, with regard to the frequent case of *deviation* from the servant’s regular employment, it is said: “No doubt a master may be liable for injury done by his servant’s negligence, where the servant, being about his master’s business, makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him. But, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master’s business; in other words, he must be *in the employ* of his master at the time of committing the grievance.”⁵ Thus A, the general manager of the defendant, a horse-dealer, had a horse and gig, which he used both for his own and the defendant’s business, and which was therefore kept at the defendant’s expense. On putting the horse into the gig, A told the defendant he was going to a certain place to collect a debt for him, and afterwards to see his own physician. Before reaching the place, he killed the horse of the plaintiff by running the gig against him. Held, the defendant was liable.⁶ So the defendant sent his son for cattle in a pasture of the defendant, supposing them to be there, but the son, not finding them there, searched for them in a neighboring field of the plaintiff, and drove off two heifers, which the plaintiff alleged to be his. Held,

¹ Per Littledale, J., *Laugher v. Pointer*, 5 B. & C. 547.

² Per Duer, C. J., *Purvis v. Coleman*, 1 Bosw. 327.

³ *Mead v. Hamond*, 1 Stra. 505.

⁴ *Goodman v. Kennell*, 1 Moo. & P. 241.

⁵ Per Jervis, C. J., *Mitchell v. Craswell*, 13 Com. B. 237.

⁶ *Fatten v. Bea*, 40 Eng. L. & Eq. 339.

the son was doing the business for which he was sent, and the father was liable.¹ So it is held that a master is liable, although the servant acted in direct violation of his orders, if in the course of his employment as a servant. As where an injury occurred in consequence of leaving a truck in the street, which the servant was ordered to place upon a lot provided for that purpose; the servant being rightfully in possession of the truck and about his master's business. So if the servant should carelessly drive against a carriage, although ordered to drive carefully and avoid coming in contact with any carriage.² So the master is liable for an act done in *misunderstanding* of his orders. Thus where a principal directed his agent to get a team of horses, intending that he should first obtain the owner's permission, which he, through a misunderstanding, failed to do, but took them without leave, and in using them killed one, it was held that the principal was liable for the value of the horse.³ (a) So a master is equally liable, where proper instructions have not been given to the servant, or such instructions have been disregarded. Thus the defendant was the owner of boards, which were piled in the mill-yard of a saw-mill, near to a pile of boards belonging to the plaintiff, and sent a man in his employment to draw away his boards, and directed him to call upon the sawyer to inform him which were the defendant's boards. The person sent, having obtained information of the sawyer, and supposing he was obtaining the defendant's boards, drew away the boards of the plaintiff with those of the defendant. Held, the defendant having sent his hired man to follow such instructions as he might obtain from the sawyer, and he having received such instructions as induced him to take away the plaintiff's boards, it was the same as if the defendant had given the instructions himself; and the defendant was liable in trespass for taking the boards, whether the fault was in the sawyer, in not giving sufficiently specific instructions, or in the hired man, in not properly apprehending or following them.⁴ So a master may

¹ Andrus v. Howard, 36 Verm. 248.

² Per Fletcher, J. Powell v. Deveney, 3 Cush. 304, 305; Philadelphia, &c. v. Derby,

14 How. 468; Southwick v. Estes, 7 Cush. 385.

³ Moir v. Hopkins, 16 Ill. 313.

⁴ May v. Bliss, 22 Verm. 477.

(a) But, in an action brought under the Illinois "act to prevent trespassing by cutting timber," it is necessary to show that the act has been wilfully violated, by proof that the defendant, in his own person, cut the trees, or induced another person to do

so, by his command or authority. It is not sufficient to show, that the trees were cut by persons employed by him to cut timber on his own land, and appropriated by them. Cushing v. Dill. 2 Scam. 460. See p. 428.

be liable in trespass for any act done by his servant, even in the course of executing his orders with ordinary care; as where a master ordered a servant to lay down a quantity of rubbish near his neighbor's wall, but so that it might not touch the wall, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall.¹ So where the defendant's slaves took timber and sawed it, without or against his orders, or by mistake; yet, if the lumber when sawed came to the defendant's use, either by being sold or otherwise appropriated to his benefit, however innocently on his part; this is a conversion, and renders the master liable in trover.²

§ 6 *a*. But, though a master is responsible for an injury resulting from the negligence of his servant whilst driving his cart or carriage, if the servant is at the time engaged in his master's business, even though the accident happens in a place to which such business did not call him; it is otherwise, if the journey upon which the servant starts be solely for his own purposes, and undertaken without the knowledge or consent of his master. The question is, was he driving on the business, and with the authority, of the master.³ Thus if a servant, in using the team of the master, with his assent, but for his own purposes and benefit, the master not being present nor giving any directions, by his negligence injures a third party; the master is not responsible.⁴ So the defendants' carman, having finished the business of the day, returned to their shop in Welbeck Street, with their horse and cart, and obtained the key of the stable, which was close at hand; but, instead of going there at once and putting up the horse, as it was his duty to do, he, without his master's knowledge or consent, drove a fellow-workman to Euston Square; and, on his way back, ran over and injured the plaintiff and his wife. Held, inasmuch as the carman was not at the time of the accident engaged in the business of his masters, they were not responsible for the consequences of his unauthorized act.⁵ (*a*) The same rule was

¹ *Gregory v. Piper*, 9 B. & C. 591; 4 Man. & Ry. 500.

² *Lee v. McKay*, 3 Ired. 29.

³ *Patten v. Rea*, 40 Eng. L. & Eq. 329; 13 Com. B. 182.

⁴ *Bard v. Yohn*, 25 Penn. 482.

⁵ *Mitchell v. Craswell*, 13 Com. B. 237; 16 Eng. L. & Eq. 448.

(*a*) The declaration alleged, that "the defendants were possessed of a certain cart and horse, which was being driven by and under the care and direction of their servant," not saying, "at the time of the grievance complained of;" and that, "whilst the plaintiff was crossing a certain street, &c., the defendants, by their servant,

applied, where a servant is ordered to drive cattle from a field, and drives them elsewhere than out of the field.¹ So it has been held, that, if one employs another to do an act which may be done *in a lawful manner*, and the latter, in doing it, unnecessarily commits a public nuisance, whereby injury results to a third person, the employer is not responsible. Thus the defendant employed A to construct a drain in a highway; A employed B to fill in the earth over the brick-work, and to carry away the surplus; and B, in performing his work, left the earth raised so much above the level of the road, that the plaintiff, driving by in the dark, was thereby upset, and sustained injury. Held, that the defendant was not responsible.² So it is held, that, where work is done for a railway company under a contract (parol or otherwise), the company are not responsible for injury resulting from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what shall be done.³ (See § 11.) And, upon the general principle *in pari delicto*, &c. (see chap. 4), it has been held that a master will not be liable for the act of a servant employed on the express recommendation of the plaintiff. Thus if an officer, having attached goods on mesne process, delivers them for safe-keeping to a bailee appointed by him on the nomination of the plaintiff, he is not responsible for the fidelity of the bailee.⁴ But it is not necessary, in order to render the master liable, that the loss or injury should have occurred solely through the neglect of the servant. Thus a colt strayed from a field on to a public road, abutting upon which was a yard, not fenced from a railway, the gate of which was, through the neglect of the company's servants, left open. Whilst the colt was being driven back to the field by the servants of the owner, it escaped into the yard, and thence on to the railway, where it was killed by a passing train. Held, that the company were responsible.⁵

§ 7. But, on the other hand, to constitute one the servant of another, with reference to a liability for the wrongful acts of the

¹ Oxford v. Peter, 28 Ill. 434.

² Peachey v. Rowland, 13 Com. B. 182.

³ Steel v. South Eastern, &c. 16 Com. B. 550; 32 Eng. L. & Eq. 366.

⁴ Donham v. Wild, 19 Pick. 520.

⁵ Midland, &c. v. Daykin, 33 Eng. L. & Eq. 193.

so negligently and improperly drove and directed the said cart and horse along the said street, that the plaintiff was knocked down and injured." Held, that the first allegation was immaterial, and not travers-

able; and that, under "not guilty," the defendants might show that the driver was not at the time of the accident acting as their servant. 13 Com. B. 237.

former, it is not necessary that the latter should be in his regular standing employ. It is sufficient that he is employed for the particular work in connection with which the injury is done; and very many of the reported cases are of this description. Thus the defendant employed A to clean out a drain on his land. A was not in the defendant's service, but was a common laborer, selected by the defendant, on account of his having dug the drain originally. A cleaned out the drain alone, and without further direction or inspection of the defendant, and received five shillings for the job. In the course of cleaning out the drain, A took up part of an adjoining highway, and replaced the same in an improper manner and with insufficient materials, in consequence of which the plaintiff's horse, passing along the highway, was injured. Held, A was not an independent contractor, but was acting as the servant and under the control of the defendant, and that the defendant was responsible to the plaintiff for the injury.¹ And a corporation is liable in tort for the tortious act of its agent, if done in their ordinary service, though the appointment of the agent be not under seal.²

§ 7 a. But a person will not be held responsible as a *master*, merely on the ground that he commenced certain work, which was afterwards pursued by others, in consequence of whose negligence an injury was caused. Thus, where a person is employed to do any work in a highway, street, or common staircase, and for the convenience of his operations makes an opening there, or places anything there which may be dangerous if left unsecured, and then goes away for a time, leaving his work unfinished, with the intention of returning to finish it at a future period, and in the meantime other workmen are using the opening, &c., for their operations; it is the duty of the latter to secure the opening, &c., at night; and, if they do not, they, and not the person who originally made the opening, are liable in damages for any accident which may happen from their neglect.³ And if one temporarily hires the servant of another, the latter is responsible, as the general master, for an injury resulting from the negligence of the servant. Thus where A, the owner of a carriage, hires four post-horses and two postilions of the defendant, a livery-stable keeper, for the day

¹ *Sadler v. Henlock*, 4 Ell. & Black. 570.

² *New York, &c. v. Dryburg*, 35 Penn. 298.

³ *Milne v. Smith*, 2 Dow, 390.

to take him from London to Epsom and back; and, in returning, the postilions damage the carriage of the plaintiff: the defendant, as owner of the horses and master of the postilions, is liable to the plaintiff for such damage.¹

§ 8. As in the class of injuries heretofore considered, which fall more properly under the head of *trespasses*, so also in cases of mere *negligence*, the personal presence of the master has been sometimes held an important consideration in reference to his liability. Thus the defendant, an engineer, being employed by A to erect a steam-boiler and other apparatus on premises adjoining to the manufactory of the plaintiff, and, in consequence of the explosion of the boiler from the insufficiency of the materials, the property of the latter being injured; and it being found by the jury *that the defendant was personally present*, and that his servants had the management of the apparatus at the time of the accident: held, the plaintiff might maintain case against the defendant.² (a)

§ 9. The liability of a master may depend somewhat upon the question, whether he receives the benefit of the *consideration* paid in connection with the act which causes the injury. Thus it has been held that the master of a stage-coach is not chargeable for goods lost by the driver, unless the master takes a price for the carriage of goods; although money be given to the driver as a gratuity.³ Upon similar ground, where the plaintiff was in the store of the defendant *as a customer*, and a clerk invited her to walk into a dark part of the store, in which there was an open trap-door, through which she, without negligence on her part, fell and broke her arm; it was held, that the defendant was liable.⁴ And the same consideration may determine, whether the relation of master and servant actually exists in relation to the transaction in question. Thus the defendants, a gas-light company, had employed A to let on gas into houses, but such employment had ceased. They, however, at the request of consumers, allowed him to continue doing so. Through the omission of A to close the end of a pipe in a room before letting on the gas, it exploded. The plaintiff, the party injured thereby, had notice of the facts above

¹ Smith v. Lawrence, 2 Man. & Ry. 1.

² Witte v. Hague, 2 D. & Ry. 33.

³ Middleton v. Fowler, 1 Salk. 282.

⁴ Freer v. Cameron, 4 Rich. 228.

(a) The master of a canal boat is liable for injury caused to a bridge by negligence of the crew, of whom he was in immediate

command, though he was at the time not on board, but on the tow-path. Korah v. Ottawa, 32 Ill. 122.

stated. Held, the defendants were not liable.¹ So a railroad was mortgaged to the defendants in trust for the benefit of bondholders. The trustees took possession, and leased the road, but, under a verbal agreement, continued to operate it for the lessees, and receive the earnings, pay the expenses, select, contract with, and discharge the employees, and exercise all the ordinary powers of railroad corporations. Held, the defendants were liable for an injury caused by the negligence of such employees.² So, on the other hand, an employer made a bargain with his employee, to cut all the logs the employer had on certain land, and to deliver them to the employer at a place named, the employer having no interest in the running of the logs until they reached the point of delivery, nor to render any assistance, pecuniary or otherwise, in the cutting or running of the logs. Held, the relation of master and servant did not exist, and that the employee alone was liable for any injury occasioned to others by his conduct in performing his contract.³

§ 10. A master is liable for the negligence of servants employed by his own servant. (a) Thus, in reference to a coachman, it is said: "He is hired by the master, either personally or by those who are intrusted by the master with the hiring of servants."⁴ So, "If a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship; and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So, the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff, or hind, who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself, or by a person specially deputed by him. So, in the

¹ *Flint v. Gloucester, &c.* 9 Allen, 552.

² *Ballou v. Farnum*, 9 Allen, 47.

³ *Moore v. Sanborne*, 2 Mich. 519.

⁴ Per Littleale, J., *Laugher v. Pointer*, 5 B. & C. 547. See 29 Barb. 419.

(a) In reference to real estate, the rule has been still farther extended. It is held, that the owner of land is bound to see to it, that his affairs thereon are so carried on as not to injure others, unless the injury be committed by a trespasser, whom he has been unable to exclude by means of due

care. Thus an owner gave general directions to A, his servant, to throw the snow and ice from his roof; and B, a friend of A, voluntarily assisted him. Held, the owner was liable for an injury caused by snow and ice thrown down by either. *Althorpe v. Wolfe*, 22 N. Y. (8 Smith) 355.

case of a mine, the owner employs a steward or manager to superintend the working of the mine; and to hire under-workmen, and he pays them on behalf of the owner. These under-workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer."¹ And the same rule applies, although both servants are themselves masters, and one is employed by the other only for the particular service in which the injury occurs. Thus the defendants, occupiers of a bonded warehouse, engaged a master porter to lower and convey a barrel of flour from their warehouse. The master porter engaged a master carter, and both of them attended with their men. During the process of lowering, the barrel fell, and injured the plaintiff, owing to the defectiveness of a rope furnished by the master porter. The defendants were held to be liable.² But, it is said, the master's liability does not extend to the negligent acts of his servants' agent or servant, unless the servant of such master has directed the particular act, or is so connected with it as to make the negligence his own, in fact as well as in law.³ Thus an express company are not liable for a package of money delivered to the clerk of their agent, outside of the agent's office, and lost in the hands of the clerk; although former agents were accustomed to receive such packages from the plaintiff, and the clerk to receive them in the office.⁴

§ 11. But while a *master* is responsible for injuries arising from the negligence of his *servant* or those employed by such servant; it is the prevailing doctrine, that a party who has *contracted* for the doing of certain work, for his use and benefit, is not liable for injuries arising in the performance of such work.⁵ (a) The dis-

¹ *Laugher v. Pointer*, 5 B. & C. 554.

² *Randelson v. Murray*, 3 Nev. & Per. 247.

239.

³ *Simons v. Monier*, 29 Barb. 419.

⁴ *Cronkhite v. Wells*, 32 N. Y. (5 Tiff.)

247.

⁵ *Cincinnati v. Stone*, 5 Ohio, N. S. 38.

(a) It is to be observed, that the relation of master and servant sometimes depends rather upon the actual connection of the parties in a particular transaction, than upon any contract between them. Thus, where A bought a heavy article of B, at his store, and sent a porter to get it, and the porter, by permission of A, using his tackle and fall, through negligence, suffered the article to fall, by which C was injured; it was held, that the porter acted as the servant of B, and that A was not answerable. *Stevens v. Armstrong*, 2 Seld. 435.

Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to the plaintiff; the Court were divided in opinion as to the liability of the owner of the carriage. *Laugher v. Pointer*, 5 B. & C. 547.

A hired a team, wagon, and teamster, of the defendant; which, while used in A's business, and by reason of a defect in the harness, ran against and killed the horse of

tion is predicated upon the ground that a master *has the control* of his servant, and can remove him for misconduct;¹ while a contractor, as between him and his employer, is responsible only *for the fulfilment of his agreement*, and, pending the performance of the work, is to a certain extent substituted for the party for whom the work is to be performed. Upon the questions, however, whether in any particular case the one or the other of these two relations subsists, whether the distinction above referred to is well founded, and, if so, how far it is modified by peculiar circumstances; many and somewhat conflicting decisions are to be found in the books. The general proposition is laid down, that, if an employer *keeps control of the mode of work*, there is no distinction between his liability for a contractor and for a servant.² And, in a very late case, that a party is liable, if the act which causes the injury is one which he employed another to do, or if it is one which it was incumbent on him to perform as a duty, and which he intrusted to another to do in his stead.³

§ 12. In an early and leading case, which, however, has been often questioned, and seems now by the weight of authority overruled; the defendant, having a house road-side, contracted with A to repair it for a stipulated sum; A contracted with B to do the work, and B with C to furnish the materials. The servant of C brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned. Held, that the defendant was answerable.⁴ So the defendant, a warehouseman, at Liverpool, employed a master porter to remove a barrel from his warehouse. The latter employed his own men and tackle; and, through the negligence of the men the tackle failed, and the barrel fell, and injured the plaintiff. Held, the defendant was liable.⁵ So an employer is held answerable for the misfeasance of one, who, on

¹ Quarman v. Barnett, 6 M. & W. 499. But see Reedie v. London, &c. 4 Exch. 244.

² Cincinnati v. Stone, 5 Ohio, N. S. 38.

³ Pickard v. Smith, 4 Law Times, 470, 4 Allen, 140.

⁴ Bush v. Steinman, 1 Bos. & Pull. 404.

⁵ Randleson v. Murray, 8 Ad. & Ell. 109.

the plaintiff. Held, the defendant was liable, the teamster being his servant and not A's. Crockett v. Calvert, 8 Ind. 127.

By arrangement between the defendant, the registered proprietor, and the licensed driver, of a hackney cab, the driver paid 4s. 6d., each morning, for the uncontrolled use of the cab and two horses during the day, and the fares earned each day belonged to the driver. The horses were fed at the ex-

pense of the defendant, and his name appeared upon a plate on the cab. Held, the driver was the servant or agent of the defendant, with authority to enter into contracts for the employment of the cab, and the defendant therefore liable for a loss occasioned by the breach of a contract by the driver safely and securely to carry. Powles v. Hider, 36 Eng. L. & Eq. 162.

account of *peculiar skill*, is employed by the day to oversee certain work, and who takes the entire charge of it.¹ So the defendants, contracting with pipe-layers to lay down water-pipes in a city, were held liable for the negligence of workmen employed by the pipe-layers.² So a municipal corporation, employing workmen to lay down gas-pipes in the borough, is responsible for their negligence.³ So a railroad corporation made a contract for the building of a certain portion of the railroad. While the contractors were at work upon the road, rocks were blasted, and a stone was thrown upon the plaintiff, causing him injury. Held, the plaintiff might maintain an action against the corporation.⁴ So the plaintiff was injured, by being thrown from his wagon by a collision with a car owned by one railroad, but drawn by horses owned by another railroad, and driven by a man employed by the latter. Held, the latter railroad was liable.⁵ So A, the lessee of a ferry, hired from the defendants, for one day, a steam-tug and crew, to assist in carrying passengers. He received the fares, and the defendants were paid by him for the hire of the tug; they sent and paid the crew. The plaintiff, who had contracted with and paid A for being carried across at all times during one year, went on board the tug from A's pier. By the negligence of the crew, some tackle broke; and the plaintiff, while on board, was injured. Held, he was entitled to recover.⁶ So, in Maine, a railroad is liable for loss by fire communicated from a locomotive (under St. 1842, c. 9, § 5), though the road is leased to another company, who at the time have the control and management of it, and who own the engine.⁷ So the owners of a floating dock leased it to the owners of a vessel, who employed a shipwright to repair the vessel. Through an imperfection in the dock, an employee of the shipwright was injured. Held, the owners of the dock were liable.⁸

§ 12 *a*. And the cases which negative the liability in question turn upon the same distinction. (See § 11.) Thus, where C had contracted with a town to widen a highway, by removing the rocks from a ledge therein, for a certain sum of money and the stone, and afterwards contracted with A to build a

¹ Morgan v. Bowman, 22 Mis. 538.

² Matthews v. West London, &c. 3 Camp. 403.

³ Scott v. The Mayor, &c. 37 Eng. L. & Eq. 495.

⁴ Stone v. Cheshire Railroad, 19 N. H. 427.

⁵ Weyant v. New York, &c. 3 Duer, 360.

⁶ Dalyell v. Tyrer, 1 Ell. B. & E. 899.

⁷ Stearns v. Atlantic, &c. 46 Maine, 95.

⁸ Cook v. New York, &c. 1 Hilt. 436.

dam for him with the stone, for which he was to receive a certain price per day while at work upon the dam and in blasting the rocks,—A furnishing the powder for the blasting, and superintending the building of the dam, but having no control of the blasting,—and, in blasting, a rock was thrown upon the building of S, causing an injury for which C was subjected in damages; held, the relation of master and servant did not exist between A and C, and A was not liable to indemnify C for such damages.¹ So the defendant A, one railroad company, by a verbal arrangement with B, another, gave to the latter the right to construct a track on the side of A's road-bed, for the purpose of connecting the two roads; which track passed over a bridge previously constructed by A for its track, and which foot-passengers had been permitted to use. The plaintiff, in passing on foot over the bridge, at night, fell through, between the rails of the connecting track, by reason of its imperfect covering, and was injured. Held, if the nuisance complained of was created solely by B in the construction of the connecting track, and B had the sole ownership, possession, and use of such track, the contract giving A no power of control in the construction or use thereof; A was not liable, though having a reversionary interest in the premises, subject to the easement of B.² So A & B had an absolute contract with a railroad, to draw its cars over a certain portion of the road, to furnish the horses and drivers, and to assume the entire control of the work. Held, while A & B were in the performance of this contract, the railroad could not be made liable for the negligent acts of their employees.³

§ 13. A numerous class of cases upon this subject are those affecting the liability of *owners of real property*, for injuries done in the performance of work upon such property. (a) Thus the defendant, the owner and occupier of premises adjoining the highway, employed A to make a drain therefrom to the common sewer. The workmen employed by A placed gravel on the highway, in consequence of which the plaintiff, in driving along the road,

¹ Corbin v. American, &c. 27 Conn. 274.

² Gwashney v. Little, &c. 12 Ohio (N. S.) 92.

³ Schular v. Hudson, &c. 38 Barb. 658.

(a) Such was the leading case of *Bush v. Steinman*; and there, as in other cases, the general principle was applied, that the owner of the soil is responsible for its proper

use, and liable to damages for any nuisance existing thereupon. It will be seen, however, that this has not been generally regarded as a decisive test of liability.

sustained personal injury. Before the accident, the dangerous position of the heap was pointed out to the defendant, who promised to remove it. A had the sole management of the work, and employed and paid B to cart away part of the rubbish at a certain price per load, and had charged the defendant in his bill with the sum so paid. Held, the defendant was liable to the plaintiff.¹ So the defendant, with the consent of the owner of the soil and the surveyor of the district, employed P, a laborer, particularly skilled in the construction of drains, but never before employed by the defendant, to cleanse a drain which ran from the defendant's garden under the public road, and paid P five shillings for the job. The defendant did not in any way interfere with or direct P in doing the job. Held, the defendant was liable for an injury occasioned to the plaintiff, whilst riding on the public road, by reason of the negligent manner in which P had left the soil of the road over the drain.² (a) So if A contract with B, to do the carpenter work of a building at a fixed price, and to superintend the other work on the building, employing hands and certifying their bills to B, who pays them, and A is guilty of negligence, in not sufficiently guarding a pit or vault opened in the sidewalk of the premises on which the building is erected; B will be responsible for damage sustained by a person falling into the opening in consequence of such negligence. Had the negligence been that of the carpenters working under A, the rule of responsibility might have been different.³ So where a person employs a mechanic to make a drain for him, on his own lauds, and extending thence to a public drain, the mechanic procuring the necessary materials, hiring laborers, and charging a compensation for his services and disbursements, the mechanic is deemed to be in the service of his employer, to the effect of rendering his employer responsible to a third person, who sustains damage by reason of want of skill or want of due diligence and care on the part of the mechanic.⁴ So A left his cart, filled with wood, by the side of the fence, within the highway, before his homestead, in the evening; and the next

¹ *Burgess v. Gray*, 1 Com. B.; 14 Law Journ. 184, N. S.

² *Sadler v. Henlock*, 30 Eng. L. & Eq. 167.

³ *Samyn v. McClosky*, 2 Ohio, N. S. 536.

⁴ *Stone v. Codman*, 15 Pick 297.

(a) Where the purchaser of land permits a third person, in possession at the time of the purchase, to retain exclusive possession, no rent being paid or claimed, the purchaser will not be liable for his building a dam

upon the land, without the knowledge of the purchaser, whereby injury is occasioned to the premises of an adjacent land-owner. *Pettibone v. Burton*, 20 Verm. 302.

morning the cart was found in the travelled path, about five rods distant from the place where it was left, upset, lying on one side, and the wood by it, constituting together a dangerous obstruction in the road. By whom or by what agency this was done, did not appear; but A, knowing the situation of his property, and having a reasonable opportunity to remove it, suffered it to remain there two or three days, when B, travelling along the highway in the night, in a one-horse wagon, drove accidentally upon the cart and wood, without previously discovering them, by reason of which he was violently thrown from his wagon, and severely and dangerously injured. In an action on the case, brought by B against A, to recover damages for this injury, it was held, 1st, that the property in question, notwithstanding its removal, continued to be legally in the possession and under the control of A; 2d, that A, having knowingly and willingly permitted his property to remain where it was so placed, was liable to B for the injury he sustained thereby; 3d, that, if the obstruction was effected by a trespasser who was unknown to A, this circumstance would not change or modify A's duties and responsibilities in the case.¹ So A hired B to move a house across a street to a lot of A's. B, in moving the house, dug a hole near the middle of the street, for fixing an anchor, by which the house could be turned. C's horse fell into the hole, which B had neglected to fill up, and was injured. Held that A was liable for the injury.² So in an action on the case for an injury to real estate, caused by the undermining of a hill on the defendant's premises, by which a *slide* occurred, covering the plaintiff's land; it is not necessary for the plaintiff to show actual negligence on the part of the defendant himself. It is enough to show that the defendant permitted another person to remove the earth from his premises, and that this was done in a negligent manner.³ So the defendant, lessee of a building, employed A, a carpenter, to repair an awning which extended from the building over a street; but there was no express provision as to terms, price, or time. By means of A's carelessness in doing the work, the plaintiff, lawfully passing in the road, sustained an injury by the falling of a rod. Held, the defendant was liable.⁴ So where a city undertakes repairs upon a highway, and the work is let out to contractors, they will be liable for accidents such as

¹ *Linsley v. Bushnell*, 15 Conn. 225.

² *Wiswall v. Brinson*, 10 Ired. 554.

³ *Gardner v. Heartt*, 2 Barb. 165.

⁴ *Brackett v. Lubke*, 4 Allen, 138.

are incident to, and consequent upon, the work itself, but not for those which result from an improper execution of it; liability for which may be limited by the terms of the contract. It seems, that, where the injury arises from the nature of the work, and not from a failure to execute it carefully; the employer of the contractor must be liable. And where the charter provided, that the commissioners should have power to contract for grading, &c., "and to direct and control the persons employed therein;" and a contract provided, that the work should be under their direction: held, the contractor's employees were the servants of the city.¹ So, on the other hand, where A, having obtained permission from a municipal corporation to lay gas-pipes in a street, makes a contract with B to do the work; it is A's duty to restore the street to a condition of safety; and he is liable for injury caused by the negligence of B's servants.²

§ 14. But, on the other hand, it is held, as has been already suggested (§ 11), that, while "every man is answerable for acts done by the negligence of those whom the law denominates *his* servants; because such servants represent the master himself, and their acts stand upon the same footing as his own;"³ "the *sub-contractor*, and not the person with whom he contracts, is liable civilly, as well as criminally, for any wrong done by himself or his servants, in the execution of the work contracted for."⁴ It is said: "The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim *qui facit per alium facit per se*. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill, or want of care, of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned."⁵ So, in very late cases, it is remarked: "the defendants had no control over the men employed by the contractors, or over the contractors

¹ St. Paul v. Seitz, 3 Min. 297.

² McCamus v. Citizens, &c. 40 Barb. 380.

³ Per Littledale, J., *Laugher v. Pointer*, 5 B. & C. 547.

⁴ Per Maule, J., *Overton v. Freeman*, 11 Com. B. 867. See *Allen v. Hayward*, 7 Ad. & Ell. N. S. 960.

⁵ Per Rolfe, B., *Hobbit v. London, &c.* 4 Exch. 255.

themselves. They could not dismiss them or direct their work. (a) There cannot be more than one superior legally responsible."¹ "If a person in the exercise of his rights employs a contractor to do work, and the latter is guilty of negligence in doing it, the contractor and not the employer is liable."² Numerous cases in addition to those already cited (§ 12 a) illustrate this principle. Thus it is often held, that *municipal corporations* are not liable for the acts or negligence of their contractors, unless the relation of master and servant exists between them.³ (See chap. 38.) So trustees or commissioners, intrusted with the conduct of public works, are not liable for injuries occasioned by the negligence of the workmen employed under their authority.⁴ As where the corporation of the city of New York, having ordered a street to be graded, contracted with A to do the grading, the whole work to be done under the direction and to the entire satisfaction of the commissioner, &c. And it was held, that the city was not liable for damages caused by the workmen employed by A.⁵ So A contracted with B to erect a tubular bridge. B had a surveyor, C, whom he paid a salary of £250 a year to attend to his general business; and, after obtaining the contract for the bridge, contracted with C to provide the necessary scaffolding, for which he was to receive £40 irrespective of his salary, B to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, and, owing to the want of sufficient light to warn the passers-by, D stumbled over the pole and was injured; subsequent to which, additional lights were placed on the spot, and B paid for them. Held, that B was not liable, and that D's remedy was against C.⁶ So contractors for public improvements are not liable for the negligence of workmen employed by sub-contractors.⁷ So

¹ Per Strong, J., *Painter v. Pittsburgh*, Law Reg. April, 1864, p. 354, Pennsylvania.

² Per Cockburn, C. J., *Gray v. Hubble*, 32 Law Journ. Rep. pt. 8, N. S.

³ *Barry v. St. Louis*, 17 Mis. 121.

⁴ *Harris v. Baker*, 4 M. & S. 27; *Hall v. Smith*, 2 Bing. 156.

⁵ *Kelly v. New York*, 1 Kern. 432.

⁶ *Knight v. Fox*, 1 Eng. L. & Eq. 477.

⁷ *Gourdier v. Cormack*, 2 E. D. Smith, 254.

(a) In a late case, even this test is held not conclusive of the employer's liability. To constitute the relation of master and servant between an employer and an employee, so as to render the former liable to indemnify the latter, for damages to which he has been subjected on account of injuries committed by him while using ordinary care in the employer's business; the employee must be acting at the time strictly in the place of the employer, in accordance

with and representing the employer's will and not his own, and the business must be strictly that of the employer, and not in any respect the employee's. The payment of an employee by the day, or the control and supervision of the work by the employer, though important considerations, are not in themselves decisive of the existence of the relation of master and servant. *Corbin v. American Mills*, 27 Conn. 274.

a railroad company is not liable for the negligence of a contractor's servants.¹ So, if the owner of goods, in shipping them, has no control over the process, which is entirely in the hands of the master of the vessel; an action for an injury, sustained by one employed by the owner to assist in shipping his goods, by reason of a defect in the tackle, unknown to the injured man, and which by the use of ordinary care might have been cured, should be brought against the master alone; though it would be otherwise when the duty lies wholly upon the owner, or is jointly divided between him and the master.² So the defendant, a builder, employed by the committee of a club, to make certain alterations at the club-house, employed A, a gasfitter, by sub-contract, to do that part of the work. By the negligence of A, in the course of the work, the gas exploded, and injured the plaintiff. Held, the defendant was not liable.³ So the defendants were permitted to construct a public sewer at their own expense, and employed one A to do the whole work at a stipulated price. The plaintiffs received an injury from the negligent manner in which the sewer was left at night. Held, the defendants were not liable.⁴ So a public, licensed drayman was employed by the defendant to haul salt from a warehouse, and deliver it at the defendant's store, for so much a barrel. While in the act of delivering it, a barrel, through the drayman's carelessness, rolled against and injured the plaintiff, being on the sidewalk. Held, the defendant was not liable.⁵ So, upon a declaration, that the defendant was licensed to run a skiff ferry across a river, and did run it by his lessee; and that the plaintiff's intestate was taken on board, and by the negligence and want of skill of the rower, was drowned: held, whether the rower was the lessee or one in his employ, and though the lease was a breach of the defendant's duty to the government, he was not liable.⁶ So A contracted with parish officers to pave a certain district, and entered into a sub-contract with B, under which the latter was to lay down the paving of a street, the materials being supplied by A, and brought to the spot in his carts. Preparatory to the paving, the stones were laid, by laborers employed by B, on the pathway, and there left unguarded at night, in such a manner as to obstruct it, and C fell over them, and

¹ *Clark v. Vermont, &c.* 2 Wms. 103;

Pawlet v. Rutland, &c. Ib. 297.

² *McGatrick v. Wason*, 4 Ohio, 566.

³ *Rapson v. Cubitt*, 9 M. & W. 710.

⁴ *Blake v. Ferris*, 1 Seld. 48.

⁵ *De Forrest v. Wright*, 2 Mich. 368.

⁶ *Blackwell v. Wiswall*, 24 Barb. 355.

broke his leg. Held, that B was responsible for this negligence, and not A.¹

§ 14 *a*. And although the tendency of former decisions has been to establish a distinction, by which the owner of *real estate* is in all cases held liable for injuries done in the prosecution of work thereupon; a doubt has been suggested, whether this distinction can be relied on.² And in a late case the distinction has been said not to exist, except in case of nuisance.³ It is held, that the true rule seems to be, that, if the nuisance causing the injury necessarily occurs in the ordinary manner of doing the work, the owner will be liable; but not if from the negligence of the contractor or his servants.⁴ And it is now the prevailing doctrine, that the general owner of real estate is not answerable for acts of carelessness, negligence, and mismanagement, committed upon or near his premises, to the injury of others, if the conduct of the business which causes the injury is not on his account, nor at his expense, nor under his orders or efficient control.⁵ Thus the owner of real estate, who contracts with a responsible party to erect a building thereon, and surrenders the premises to him for that purpose, is not liable for injuries to third persons, occasioned through the negligence of such contractor or his servants.⁶ So the owner of land, who employs a carpenter, for a specific price, to alter and repair a building thereon, and to furnish all the materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in such alteration and repair.⁷ So where A agreed to convey land to B, and B agreed to build a house thereon and pay for the land, and, while the agreement was in force, B, in preparing to build the house, on his own sole account, by workmen employed by himself alone, undermined the wall of the adjoining house of C, whereby it was injured; it was held that A was not answerable for this injury, although the title to the land remained in him at the time when the injury was committed.⁸ So the owner of land is not answerable to his adjoining neighbor, for damages resulting from the act of contractors, who had the entire control of the

¹ *Overton v. Freeman*, 11 Com. B. 867.

² Per *Ld. Denman*, *Milligan v. Wedge*, 12 Ad. & Ell. 737.

³ Per *Ld. Chan. Cranworth*, *Reedie v. London, &c.* 4 Exch. 244.

⁴ *Scammon v. Chicago*, 25 Ill. 424.

⁵ *Earle v. Hall*, 2 Met. 353.

⁶ *Scammon v. Chicago*, 25 Ill. 424.

⁷ *Hilliard v. Richardson*, 3 Gray, 349.

⁸ 2 Met. 353.

premises to erect a building, provided the act causing the damage was not specified to be done by the contract.¹ And, on the other hand, where A contracted with B and C to build her a house, to be finished complete; and B and C employed D, a blacksmith, to make and place a grating in the area; and the hole over which the grating was to be placed was left uncovered, and E fell into it, and broke his leg: held, B and C, the first contractors, were liable to E.² So a wall was erected on the defendant's boundary line according to a written contract, he furnishing the materials, but not hiring the workmen, or overseeing or having any other connection with the work. Held, no relation of master and servant, or principal and agent, existed between him and the builder, and therefore he was not liable to his neighbor, for damages incurred, by the wall's blowing down before completion.³ So the owner of land, who contracts with competent mechanics for the erection of buildings thereon, is not liable to third persons for injuries occasioned solely by their negligence while prosecuting the work. As where a carpenter, who had agreed to construct a suitable gutter and pipe, to lead the water from the roof into the drain, omitted to do so, and in consequence the water flowed on the plaintiff's land and injured his goods. Though it would be otherwise, if the injury was occasioned by the neglect of the owner to make a connection between the pipe and the drain, which he had undertaken by himself or his agent to make.⁴ So where A, about to erect a building on his lot, contracts with B to furnish and set the marble for the front, agreeably to certain specifications, and for a definite sum, and neither interferes with the work nor reserves any right of interference or direction; A is not liable to a third person for an injury sustained in consequence of the negligence of B's employees engaged in setting the marble. They are not A's servants.⁵

§ 15. The question, indirectly involved in almost all the cases upon this subject, and more especially in those relating to real estate, has also been more distinctly raised, whether the general exemption from liability for the negligence of a contractor is applicable to contracts, either by their terms involving, or in their execution causing, what the law technically considers a

¹ *Gilbert v. Beach*, 4 Duer, 423.

² *McCleary v. Kent*, 3 Duer, 27.

³ *Benedict v. Martin*, 36 Barb. 288.

⁴ *Gilbert v. Beach*, 5 Bosw. 445.

⁵ *Potter v. Seymour*, 4 Bosw. 140.

nuisance. (See chap. 18, § 13, *a*.) Upon this subject it is said: "It is not necessary to decide whether, in any case, the owner of real property may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that in some cases he is responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbors, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants."¹ And upon the same principle it is held, that, where a person is employed to do an unlawful act, by which an injury is occasioned to a third person, the employer is liable to an action for such injury, though the party employed be a contractor, and the act that of his servants. Thus the defendants, a registered joint-stock company, contracted with W for the laying of their main gas-pipes, in the streets of Sheffield, having no special powers for that purpose. The servants of W left a heap of earth and stones, which had been thrown out of the trenches dug for receiving the pipes in one of the streets, and the plaintiff, in passing along the street, tumbled over it and was injured. Held, the defendants were liable.² So the defendant had caused certain vaults to be constructed in front of his house, and within the line of the street, by a contract which provided for the proper flagging of the sidewalk above the vaults. More than a year after the completion of the work, the plaintiff was precipitated into the area, by the giving way beneath him of a flag-stone, which formed part of the covering of the vaults. The testimony as to the manner in which the work had been executed was conflicting. Held, the defendant was liable.³

§ 15 *a*. But where A contracted to pave a district, and B contracted with him to pave a particular street, A supplying the stones, his carts being used to carry them; and, in the course of the work, B's men negligently left a heap of stones in the street, so as to cause serious injury to the plaintiff: held, that A was not liable, although the act amounted to a public nuisance.⁴ So the defend-

¹ *Reedie v. London, &c.* 4 Exch. 244.

² *Ellis v. Sheffield, &c.* 22 Eng. L. & Eq. 198; 2 Ell. & Bl. 766; 5 Duer, 495.

³ *Congreve v. Morgan*, 5 Duer, 495.

⁴ *Overton v. Freeman*, 8 Eng. L. & Eq. 479.

ants contracted with A, to fill in the earth over a drain which was being made for them across a portion of the highway, from their house to the common sewer. A, after having filled it in, left the earth so heaped above the level of the highway as to constitute a public nuisance, whereby the plaintiff, in driving along the road, sustained personal injury. A few days previous to the accident, and before the work was completed, one of the defendants had seen the earth so heaped over a portion of the drain, but, beyond this, there was no evidence, that either defendant had interfered with, or exercised any control over the work. Held, there was no evidence to go to the jury of the defendant's liability.¹ (a)

¹ *Peachey v. Rowland*, 16 Eng. L. & Eq. 442.

(a) In the case of *Hilliard v. Richardson*, 3 Gray, 349, Mr. Justice Thomas gives the following comprehensive view of late cases in Massachusetts upon this important subject: "*Stone v. Codman* (15 Pick. 297) was this. The defendant employed one Lincoln, a mason, to dig and lay a drain from the defendant's stores, in the city of Boston, to the common sewer. By reason of the opening made by Lincoln and the laborers in his employment, water was let into the plaintiff's cellar, and his goods were wet. 1. Lincoln procured the materials and hired the laborers, charging a compensation for his services and disbursements. 2. The acts causing the injury to the plaintiff's goods were done upon the defendant's land, and in the use of it for the defendant's benefit. 3. There was no contract, written or oral, by which the work was to be done for a specific price, or as a job. 4. The case is expressly put upon the ground that between the defendant and Lincoln the relation of master and servant existed."

In the case of *Lowell v. Boston and Lowell Railroad*, 23 Pick. 24, the action was to recover of the railroad the damages which the town had been compelled to pay in consequence of a defect in the highway caused by the construction of the railroad. "The railroad corporation denied their responsibility for the negligence of the persons employed in the construction of that part of the railroad where the accident took place, because that section of the road had been let out to one Noonan, who had contracted to make the same for a stipulated sum, and had employed the workmen. This defence was not sustained; nor should it have been. — It is the corporation that are intrusted by the legislature with the execution of these public works, and they are

bound, in the construction of them, to protect the public against danger. — They cannot escape this responsibility by a delegation of this power to others. The work was done on land appropriated to the purpose of the railroad. The barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders."

In the case of *Earle v. Hall*, 2 Met. 353, "The general doctrine is stated to be, that we are not merely to inquire who is the general owner of the estate, in ascertaining who is responsible for acts done upon it injurious to another; but who has the efficient control, for whose account, at whose expense, under whose orders is the business carried on, the conduct of which has occasioned the injury."

The learned Judge proceeds to examine the cases, upon which the leading decision of *Bush v. Steinman* purports to rest. — "*Stone v. Cartwright* (6 T. R. 411), lays no foundation for the rule in *Bush v. Steinman*. The decision was — that no action would lie against a steward, manager, or agent, for the damage of those employed by him in the service of his principal."

"The case of *Littledale v. Lonsdale* (3 H. Bl. 267), in its main facts, cannot be distinguished from *Stone v. Cartwright*. The defendant's steward employed the workmen. They were paid out of the defendant's funds. The machinery and utensils belonged to the defendant, and all the persons employed were his immediate servants."

Rosewell v. Prior (2 Salk. 460), merely decided that an action for continuing to obstruct lights might be brought against the party who erected the obstruction, though a previous suit had been brought for the

§ 16. The question of liability of a master for his servant has often arisen in connection with *public officers*. It is held, that the head of a public office under government, with power to appoint and remove the servants of the office, who are to be paid by, and give, at his discretion, security to government, is not responsible to an individual, for a loss occasioned by the default of such servant. The servant guilty of the default is responsible. Thus, in England, the postmaster general is held not answerable for a packet delivered to the receiver at the post-office, and lost out of the office. But the receiver is liable.¹ Nor for the value of a bank-note, stolen by one of the post-office employees out of a letter delivered into the office.² And more especially is this principle applied to a person acting gratuitously for the public. Such party is not liable for the consequence of any act which he was authorized to do, and which, so far as he is concerned, is done with due care and attention; nor for the negligent execution of an order properly given to others. Thus clerks to commissioners, appointed under a lighting and paving act, and intrusted with the conduct of public works, are not liable in damages for an injury occasioned by the negligence of those persons whom they employ to conduct the works.³ So the plaintiff's vessel received damage, through the negligence and unskilfulness of the master of a steam-tug, which was employed in towing it in the harbor of N. By an act of

¹ Lane v. Cotton, 1 Ld. Raym. 646.

² Hall v. Smith; Billington v. Same, 9

³ Whitfield v. Ld. LeDespencer, 2 Cowp. Moo. 226; 2 Bing. 156.

original erection, and though the defendant had leased his premises.

In *Michael v. Alestree* (2 Lev. 172), it was held that an action would lie against a master for damage done by his servant in exercising his horses in an improper place.

"The examination of these cases justifies the remark that *Bush v. Steinman* does not stand well upon the authorities. — The rule it adopts is apparently for the first time announced. — All the opinions given in it lose sight of these two important distinctions: In the cases cited and relied upon, the acts done, which were the subjects of complaint, were either acts done by servants or agents, under the efficient control of the defendants, or were nuisances created upon the premises of the defendants, to the direct injury of the estate of the plaintiffs."

The learned Judge proceeds to examine the cases subsequent to *Bush v. Steinman*,

and comes to the conclusion that that case "is no longer law in England. If ever a case can be said to have been overruled, indirectly and directly, by reasoning and by authority, this has been." — The case at bar "can only stand, where *Bush v. Steinman*, when carefully examined, stands, upon the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do — to adopt which would be to ignore all limitations of legal responsibility."

The opinion above quoted is termed "the most exhaustive examination of the point to be found in any case." *Law Reg.* April, 1864, p. 359. See *Brackett v. Lubke*, 4 Allen, 138; *Michigan, &c. v. Leakey*, 10 Mich. 193. Also, overruling *Bush v. Steinman*; *Painter v. Mayor, &c.* 46 Penn. 213.

parliament, which appointed commissioners of the harbor, it had been provided, that it should be lawful for the commissioners to build or provide steam-tugs for towing vessels into or out of the harbor, and that any person requiring the assistance of a towing-vessel should pay to the commissioners such reasonable compensation as the commissioners should fix. An arrangement had been entered into between the commissioners and the proprietors of the steam-tugs, which had previously plied in the harbor, without being subject to any control of the commissioners, that the proprietors should employ their boats at a reduced scale of charges, and that the commissioners should pay them an annual compensation for the reduction. The steam-tugs had been, by consent of the proprietors, placed under the control of the harbor-master, who was authorized by the act to give directions respecting the management of vessels in the harbor. Held, the plaintiff could not maintain an action against the commissioners.¹

§ 16 *a*. On the other hand, one employed by a public officer is himself held liable for the consequences of his own negligence. Thus an action on the case lies against paviors, employed by the commissioners appointed by parliament for paving the streets, for raising the pavement in front of the plaintiff's houses, by which the passage and lights to the houses are obstructed.² So a draw-tender of a bridge, appointed by the governor, with a salary, and giving bonds, having full control and direction of all vessels passing the draw, of the opening of the draw, and the care of the lamps, is liable to one injured in passing.³

§ 16 *b*. And similar questions of liability have arisen, where the position of parties is reversed, and it is sought to charge a party, for a loss arising from the fault or neglect of a public officer whom he has employed. In reference to a case of this nature it is said, that, where an employee is exercising a distinct and independent employment, and is not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or carelessness of the employee. Thus, where a public licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer, at so much per barrel, and, while in the act of delivering the salt, one of the

¹ *Cuthbertson v. Parsons*, 10 Eng. L. & Eq. 521.

² *Howell v. Wright (Mass.)*, Law Reg. May, 1862, p. 436.

³ *Leader v. Moxon*, 3 Wils. 461; acc. 1 *Ld. Raym.* 646.

barrels, through the carelessness of the drayman, rolled against and injured a person passing on the sidewalk ; it was held, that the employer was not liable for the injury.¹ And the same rule is more especially applied, where the loss is owing to a servant of the public officer himself. Thus the buyer of a bullock employed a licensed drover to drive it from Smithfield. By the by-laws of London, no one but a licensed drover could be so employed. The drover employed a boy to drive the bullock (together with others, the property of different persons) to the owner's slaughter-house. Mischief was occasioned by the bullock, through the careless driving of the boy. Held, that the owner was not liable for the injury ; the boy not being, in point of law, his servant ; although the careless driving and accident took place after the boy had driven the bullock beyond the bounds of the city, towards the defendant's house. And it was said that the owner would not have been liable, if the drover himself had been driving at the time of the injury.²

§ 17. Similar questions have arisen (see chapters 38 and 39) in relation to *corporations* and the officers thereof, or parties claiming under them. Thus it is held, that the corporation of the city of New York, which had ordered a street to be graded, and had contracted with a person to do the grading, is not liable for damages caused by the negligence of the workmen employed by the contractor ; although the contract provides that the work shall be done under the direction and to the satisfaction of certain officers of the corporation.³ And, on the other hand, where a license or grant to construct a sewer was given by the city authorities, with the provision that the grantees should cause " proper guards and lights to be placed at the excavation, and should be answerable for any damages which might be occasioned to persons, animals, or property in the construction of the sewer ; " it was held that this provision did not enure to the benefit of a stranger, so as to render the grantees liable to such stranger for the negligence of servants or agents, for whose conduct they would not otherwise be responsible.⁴

§ 17 *a*. But the corporation of the city of New York is held liable for injuries to third persons, resulting from the negligence of persons employed by officers of the corporation, in the repair of the public sewers.⁵ So where the mayor and aldermen of

¹ *De Forrest v. Wright*, 2 Mich. 368.

² *Milligan v. Wedge*, 12 Ad. & Ell. 737 ;

⁴ *Per. & Dav.* 714.

³ *Kelly v. New York*, 1 Kern. 432.

⁴ *Blake v. Ferris*, 1 Seld. 48.

⁵ *Lloyd v. New York*, 1 Seld. 369.

Memphis procured a cistern to be dug, which occupied a portion of a sidewalk of the city; and, it being negligently left open, the plaintiff fell into it and was disabled; held, the mayor and aldermen had the right to cause the cistern to be dug, but were responsible for damages occasioned by the negligence of the agents or servants employed by them for that purpose.¹

§ 18. The *delay* of an agent should be considered as delay of his principal.² So a principal is responsible, either by way of avoiding a contract or otherwise, and as against innocent third persons, for the *fraud* of his agent, though unknown to him, if committed while transacting the business of the principal; and whether he be sole agent, or one of several, possessing joint authority.³ Thus where the agent, a broker, induced the defendant to enter into the contract, believing that he was acting solely in his behalf, while in fact he was secretly in the employ, and acting for the interest, of the plaintiff, his principal; held, the plaintiff could not enforce the agreement.⁴ So where an agent by fraud purchases property at a sale on execution, at a low price, part of which he afterwards conveys to his principal; the principal cannot hold the property as against the execution-debtor.⁵ So the act of a cashier, making an arrangement with the stockholders of another bank not organized, to organize it in evasion of their charter, although illegal; still, if done not for himself or his benefit, but for the bank and the bank's benefit, and beneficial thereto, and known to the directors, or, if unknown, unknown on account of their negligence, and not repudiated, exposed, or neutralized, is the act of the bank, and debars it from resorting to the stockholders of the other bank for payment of bills of the latter.⁶ So where a bill of exchange was sent to one of the directors of a bank, to be discounted for the benefit of the drawer, and the former, who was at the same time a member of the board which ordered the discount to be made, received the avails, alleging the discount to be for his own benefit; held, that the bank was chargeable with knowledge of the fraud, and therefore could not recover upon the bill.⁷ So

¹ *Mayor, &c. v. Lasser*, 9 Humph. 757.

² *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80.

³ *Bank, &c. v. Davis*, 2 Hill, 451; *Griswold v. Haven*, 25 N. Y. (11 Smith), 595; *Calhoun v. Wright*, 23 Tex. 522. See *Atlantic, &c. v. Merchants', &c.* 10 Gray, 532; *Smout v. Ilbery*, 10 M. & W. 1.

⁴ *Cassard v. Hinman*, 6 Bosw. 8.

⁵ *Wright v. Calhoun*, 19 Tex. 412.

⁶ *Robinson v. Bealle*, 20 Geo. 275.

⁷ *Bank, &c. v. Davis*, 2 Hill, 451. See *Nelson v. Cowing*, 6 Hill, 336; *Gibson v. Colt*, 7 Johns. 390; *Sandford v. Handy*, 23 Wend. 260.

a railroad company is liable for the fraud or negligence of its agent, who, from improper motives or against the usage of the company, deprives a person of his rightful facilities for transportation.¹ So a principal is chargeable with the fraudulent acts and declarations of a special agent, done and made for the purpose of effecting a sale, though not commissioned to commit a fraud. And, even where a party could not recover damages against a principal on account of the fraudulent representations of his special agent, he may avail himself of those representations by way of defence to an action on the contract by the principal.² And though the principal was not aware, at the time, that the representations of his agent were false, he is nevertheless liable, on the principle that, of two innocent parties, the one shall suffer whose agent causes injury to the other.³ (a) So he is liable, although the agent had no knowledge that the representation was false, and though the principal did not instruct him to make it, if the principal had knowledge as to the fact misrepresented. Thus the defendant, being owner of a house, employed an agent to sell it. The agent described it as free from rates and taxes, and did not know it to be otherwise; but it was in fact liable to certain rates and taxes, as the defendant knew. On the faith of the agent's description, the plaintiff bought the house. Held, that the plaintiff might maintain case for deceit against the defendant; though it did not appear that the defendant had instructed the agent to make any representation as to rates or taxes.⁴

§ 19. But, although a master is civilly responsible for the fraud as well as negligence of his servant, acting in the course of his employment; the general rule applies alike to both descriptions of wrong, that the master is not responsible for acts done by the servant for his own private advantage, out of the scope of his authority, or inconsistent with the course of his employment. As where a wagoner took rags from a railroad depot to his employer's paper-mill, supposing them to be his.⁵ So where A, the servant

¹ *Galena, &c. v. Rae*, 18 Ill. 488.

⁴ *Fuller v. Wilson*, 3 Ad. & Ell. N. S.

² *Concord Bank v. Gregg*, 14 N. H. 58.

331.

⁵ *The Pennsylvania, &c. v. Zug*, 47 Penn. 480.

³ *Hunter v. Hudson, &c.* 20 Barb 493.

(a) More especially, where a principal, knowing a material objection to his property, employs an agent, who is ignorant of such objection, to sell or let the property, and the latter unconsciously makes a false

representation to the purchaser, thereby inducing a contract; the former will be bound by such misrepresentation. *National, &c. v. Drew*, 32 Eng. L. & Eq. 1.

of a wharfinger, untruly and fraudulently signed a receipt, purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf, to be shipped to the order of C, and thereby wilfully induced C to pay the price to the pretended vendor; it was held, that the wharfinger was not liable, although C's course of dealing was, to pay for all wheat delivered for him at the wharf, on the production by the vendor of the wharfinger's receipt; and the latter knew it.¹ So, in late cases, parties were held not liable for the *usury* of their agents.² (a)

§ 20. While a master is in general responsible for the wrongs of his servant; the question arises, whether this is an exclusive liability, or whether the servant is not also responsible. It has been sometimes held, that trover cannot be maintained against a servant who has acted by his master's command, unless it were to do an apparent wrong. That where the master's case depends on a title, as where the command is given under the color of a right, whether valid or not, the servant will be excused. For it would be unreasonable to require the servant to scrutinize the master's title, and thus to make him in all cases act at his peril.³ (b) And, upon this subject, it is said, by an approved writer: "It has

¹ *Coleman v. Riches*, 16 Com. B. 104; 29 Eng. L. & Eq. 323; acc. *Grant v. Norway*, 10 Com. B. 665; *Hubbersty v. Ward*, 8 Exch. 330; *Wilson v. Fuller*, 3 Ad. & Ell. N. S. 68; 3 Gale & Dav. 570.

² *Bell v. Day*, 32 N. Y. (5 Tiff.) 165; *Fellows v. Commissioners*, 36 Barb. 655.

³ *Mires v. Solebay*, 2 Mod. 242; *Berry v. Vantries*, 12 S. & R. 89, 92. See *White v. Madison*, 26 N. Y. (12 Smith), 117.

(a) If the purchaser of goods from an agent, knowing that the goods were held by the agent for the account of principals, place the amount to the credit of the agent, against a previous indebtedness of the agent, it is not a payment. If the agent pledge them to secure such a debt, and the pledgee refuse, on demand, to return them to the owner and sell them at auction, the owner may recover damages for the conversion, or proceed, waiving the tort, to recover the avails of the sale as money had and received to his use. *Henry v. Marvin*, 3 E. D. Smith, 71.

When one dealing with an agent induces the latter to set off a debt, due from the agent personally to him, against one due from himself to the principal, it is a fraud on the principal, and not binding upon him, unless he ratifies the transaction, with full knowledge of all the facts. *McNair v. McLennan*, 24 Penn. 384.

Where a broker pledges the goods of his principal as his own, the pawnee cannot claim to retain them against the principal,

in trover, for the amount of the lien which the broker had on the goods for his general balance, at the time of such pledge. It may be otherwise, where one who has a lien delivers the goods to a third person as security, with notice of his lien, and appoints him to continue his possession, as his servant, for the preservation of his lien. *M'Combie v. Davies*, 7 E. 5.

If an agent, authorized to sell goods for money only, sells his own goods and those of his principal in one sale, receiving payment in money and other property, and, while selling his own goods, for the purpose of defrauding his creditors, sells with them, in his own name, the goods of his principal; the principal cannot rescind the sale. *Moore v. Thompson*, 32 Maine, 497.

(b) A military officer, acting under the martial law, is justified by an order from a superior officer, apparently within the scope of his authority. If the superior has secretly abused his power, he, and not the inferior who executes the order, is answerable. *Despan v. Olney*, 1 Curt. 306.

been supposed, that trover cannot be supported against a servant, for an unlawful intermeddling with the goods of another, by the command of his master, unless such intermeddling amount to a trespass; but this doctrine appears to have been overruled, and trover may be supported against a servant or agent, or any other person, who intermeddles with, or unlawfully converts goods to the use of another. And it is clear that a servant cannot plead the command of his master or principal, to what in point of law is a trespass. However, for deceit on the sale of goods, as for a false warranty, in general, when the agent acted in pursuance of the direction of his principal, the action must be against the latter. A servant or deputy cannot, in general, be sued for a mere non-feasance; but for misfeasance or malfeasance, an action may in some cases be supported against a servant or deputy. And no action is sustainable against an intermediate agent or steward, for damage occasioned by the negligence of a sub-agent, but the action must be against the principal, or the person who actually committed the injury."¹

§ 20 *a*. As thus suggested, in reference to *intermediate* agents or servants, it is held, that no action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal, but the principal, or those actually employed, only, are liable.² Thus, in an action to recover for an injury sustained by reason of alleged negligence in blasting rocks, it appeared that one A contracted to do the stone-work and masonry on a railroad, and, with his men, commenced quarrying stone from a certain ledge. He afterwards employed the defendant, as his general agent, to superintend all the work upon his contract; and, as such agent, the defendant gave to one B, the special agent of A, who had charge of the blasting on the ledge, general directions respecting the work upon the ledge. B gave the directions relative to the particular blast, by which the injury complained of in this action was incurred; and the defendant, at the time of the blast and previously, was in another part of the ledge, paying no attention to the preparation of the blast. Held, the action should have been brought against A or B, and that it could not be sustained against the defendant.³ So the president

¹ 1 Chit. Pl. 74, 75.

² *Brown v. Lent*, 20 Verm. 529

³ *Stone v. Cartwright*, 6 T. R. 411. See *Grylls v. Davies*, 2 B. & Ad. 514.

of a corporation is not made liable to an action for a personal injury, merely by transmitting an order of the corporation to a servant, who in executing it uses illegal force. Otherwise, if the order is issued by him on his own responsibility.¹

§ 20 *b*. And the general doctrine above referred to has been often applied, that a servant or deputy is not chargeable, as such, for *neglect*, but only for *misfeasance*; but recourse must be had to the principal;² that, where an agent neglects to perform a duty which he owes to his principal, and third persons are thereby injured, their remedy is against the principal, and not against the agent.³ And where the Court qualified this proposition by adding, that, where there was negligence *in the doing of an act*, and injury thereby was done to another, an action could be sustained against the agent; it was held erroneous.⁴ Thus, where the plaintiff was the assignee of a certificate of stock, standing in the name of another person, in a foreign banking corporation, which had a transfer office in New York, under the charge of the defendant, an agent authorized to register transfers, who unjustly refused to permit A's stock, which was registered in that office, to be transferred to him on its books; it was held, that an action could not be maintained.⁵ (a)

¹ Hewett v. Swift, 3 Allen, 420.

² Lane v. Cotton, 12 Mod. 472, 488.

³ Denny v. Manhattan Co. 2 Denio, 115.

⁴ Henshaw v. Noble, 7 Ohio, 226.

⁵ Denny v. Manhattan Co. 2 Denio, 115.

(a) In general, an agent may make the same defence which his principal might make. Thus the defendant, while at home on a visit to his father, impounded the plaintiff's cattle, doing damage on the father's land, but with the approbation of the father, and the assistance of a boy sent to him for the purpose. The defendant and his father had previously consulted as to the expediency of such impounding. Held, the defendant might make the same justification which the father might have done. *Barrows v. Fassett*, 36 Verm. 625.

A mere contractor, though upon a public work, who is not a public officer, is not liable to third persons for damages occasioned by the non-performance of his contract. *Fish v. Dodge*, 38 Barb. 9.

There is a material and plain distinction between obligations or duties imposed by law, as upon public officers, and those created by contract merely. The former are created for the benefit of, and are due to, every one who has occasion for, or an in-

terest in their performance; and hence any one, peculiarly injured by their non-performance, may maintain an action against him who owes the duty. But the latter rest between the contracting parties alone, and none but parties or privies can enforce or maintain an action upon them. *Ibid*.

Thus one, who has contracted with the State to keep a section of the Erie canal in repair, is not liable to an individual who has sustained damages in consequence of his neglecting to perform that duty. The principle, *respondent superior*, does not apply to such a case, and affords no shield to the contractor, who is exercising an independent employment under a contract, and is in no sense a servant or agent of any one. *Ibid*.

On the other hand, neither the contracting boards, nor the canal commissioners, incur any liability. Nor is the sovereign, or State, liable, because negligence in the selection of an agent or a servant cannot be imputed against the State. *Ibid*.

§ 20 c. But the prevailing doctrine is, that an action, based even on the *negligence* of persons doing work, lies against them, as well as their employers; ¹ that the command of a superior, to commit a *trespass* or other *unlawful act*, is no justification to an inferior; ² (a) that the servant is only to obey his master in matters that are "honest and lawful;" ³ and that, if one person commit an unlawful act or misfeasance under the direction of another, that fact will not shield him from responsibility, but both are equally liable to the injured party. ⁴ Thus an agent, who has wrongfully obtained property, cannot defend against the injured party, on the ground that he acted only as agent, and has paid over the money to his principal. ⁵ So a contractor, employed by a board of health to do a particular act, if guilty of negligence in doing the act, is personally liable for the consequences; notwithstanding the *Health of Towns Act*. ⁶ So agents for the collection of rent, under whose direction a broker acted in levying a distress-warrant for rent, signed by them, after a sufficient tender of the amount due, are liable in trespass. ⁷ So an agent, who negligently directs water to be admitted to the water-pipe in a room of a house owned by his principal, but of which he has the general management, is guilty of misfeasance, and is liable to the tenant of the shop below for the damages resulting from such admission. And the fact, that the room, in which the pipe is, is leased to another tenant at the time, is not conclusive against his liability. ⁸ So A, having entered the close of the plaintiff, and cut a quantity of cord wood, sells it to B, who hires the defendant, the master of a coasting-vessel, to go in company with C, and transport the wood to market. Held, the defendant was liable for the value of the wood in an action of trespass *qu. claus.* brought by the plaintiff, although he was ignorant of the original trespass committed by A. ⁹

¹ *Hardrop v. Gallagher*, 2 E. D. Smith, 523.

² *Brown v. Howard*, 14 Johns. 118; *Perkins v. Smith, Sayer*, 40; *Mires v. Solebay*, 2 Mod. 244.

³ 1 Bl. Comm. 430.

⁴ *Johnson v. Barber*, 5 Gilm. 425; *Richardson v. Kimball*, 28 Maine, 463.

⁵ *Wright v. Eaton*, 7 Wis. 595.

⁶ *Arthy v. Coleman*, 8 Ell. & B. 1092.

⁷ *Bennett v. Bayes*, 5 Hurl. & Nor. 391.

⁸ *Bell v. Josselyn*, 3 Gray, 309.

⁹ *Higginson v. York*, 5 Mass. 341.

(a) A servant keeping the key of a room, knowing that a man is imprisoned therein, is a trespasser. 3 Stark. Ev. 1445, n. y.

No action lies against the owners of a transport vessel employed by the government, for damage done in the execution of

positive orders of an officer of the royal navy, in command of her. This exemption depends not on martial law, but on the fact that in such case there can be no negligence. *Hodgkinson v. Farnie*, 40 Eng. L. & Eq. 306.

§ 20 *d.* And the rule more especially applies, where the *agency is not disclosed*. Thus one who exchanges counterfeit money for an agent, supposing him to be the principal, may proceed against either, upon learning the fact of the agency.¹ (*a*) But it is also held, that an agent, though professedly acting as such, is individually responsible to the purchaser, for a fraud committed by him in the sale of property.² So, when money is paid to an agent by fraud or duress, or when his principal has no legal right to it, or when it is paid to him by mistake; it may be recovered from the agent, so long as it has not been paid over to his principal, nor his situation altered, relatively to his principal, as touching that fund. So, if notice be given, the agent will be liable, even if he does pay it over, or his situation is afterwards altered.³ And an auctioneer, who receives and sells stolen property, innocently, and in the ordinary course of his business, is liable to the owner for a conversion, though he has paid over the money to the felon before he knew of the theft, and though the thief be not prosecuted to conviction.⁴

§ 21. Notwithstanding some contrary authorities (see § 20), the general rule upon this subject is applied to trover as well as other actions for tort; that it is no defence, that the defendant acted under the employment of another, who was himself a trespasser.⁵ Thus trover will lie against an overseer, for an innocent conversion by him for the benefit of his master, whether with or without his authority.⁶ So where a cartman, at the request of another person, takes goods and carries them away on his cart, under circumstances sufficient to put him on his guard as to the legality of the taking; he is equally liable with the employer to an action of trover for the goods, at the suit of the owner.⁷ And a servant may be charged in trover, although the act of conversion be done by him for the benefit of his master.⁸ Or though he disposes of the goods to his master's use, whether he has any authority or not for so doing from the master.⁹ And one who, as agent, intermed-

¹ Fishback v. Brown, 16 Ill. 74.

² Campbell v. Hillman, 15 B. Mon. 508.

³ McDonald v. Napier, 14 Geo. 89.

⁴ Rogers v. Huie, 1 Cal. 429.

⁵ Gaines v. Briggs, 4 Eng. 46.

⁶ Porter v. Thomas, 23 Geo. 467.

⁷ Thorp v. Burling, 11 Johns. 285.

⁸ Stephens v. Elwall, 4 M. & S. 259.

⁹ Perkins v. Smith, 1 Wils. 328; Sayer, 40.

(*a*) Where an agent has incurred personal liability by not communicating the name of his principal, he is not discharged from such liability by the fact, that the

principal agreed with A to submit the matter in dispute to arbitration. Nason v. Cockcroft, 3 Duer, 366.

dles with the goods of another, is guilty of a conversion, if the act would have been such if done by his principal, although he was ignorant of the owner's title; and may be sued in trover, although he has parted with the possession to his principal.¹ So the defendant, a jeweller, received from A and wife a set of diamond earrings and pin, belonging to the plaintiff, supposing they were the owners; and as their agent, and for their accommodation, negotiated a sale of them to R. & B. of New York city for \$200. He received the proceeds of sale, and paid them over to A, in ignorance of the plaintiff's title, and without any charge for services. Held, he was liable in trover.²

§ 21 *a*. A having lawfully received certain bills from B, a trader, C came to him, and, stating that he was acting on behalf of Messrs. Y. & Co., creditors of B, demanded the bills from A, and, upon his refusal, said that B was about to be made a bankrupt, that the bills must be given up, and that, if they were not, A would be compelled to give them up by the commissioner, and the expense would cost A £200, and the commissioner would be very angry. A was at the time ill in bed, and, being greatly alarmed, gave up the bills. Held, that this was no conversion by C, as trespass would not have been maintainable. But, it appearing that afterwards, and before C had handed the bills to his principals, he was informed that the plaintiff was entitled to the bills, and possession of them was demanded on behalf of the plaintiff, but, notwithstanding, he delivered them to Y. & Co.; held, this was a conversion.³

§ 21 *b*. But the refusal of a servant to deliver goods intrusted to him by his master, on a demand made by a stranger, is held not sufficient evidence of a conversion, in an action by the latter against the servant.⁴ (*a*)

§ 21 *c*. In an action for conversion of machinery in a workshop, by refusal of A, an agent, to allow its removal, there was no proof that the defendant or A ever actually used it, or had actual

¹ *Lee v. Mathews*, 10 Ala. 682; *Per-
minter v. Kelly*, 18 Ala. 716.

² *Dudley v. Hawley*, 40 Barb. 397.

³ *Powell v. Hoyland*, 2 Eng. L. & Eq.
362.

⁴ *Mount v. Derick*, 5 Hill, 455.

(*a*) Nor will such demand and refusal be sufficient evidence of a conversion to charge the master, unless the servant refused under directions from the master. *Mount v. Derick*, 5 Hill, 455.

Though, on demand made of the servant,

he refuse to deliver, because he has no authority, and his conduct be afterwards approved by the master for that reason, the approval will not render the latter chargeable with a conversion. *Ibid*.

possession of it, except by being in rightful possession of the shop. The defendant had instructed A to forbid such removal, but to use no force. Upon a demand, including machinery to which the plaintiff had no title, A forbade the removal of any of it. The jury were instructed, that the evidence showed such an assumption of control or dominion over the property, to the exclusion or in defiance of the plaintiff's right, as would amount to a conversion. Held, erroneous, the facts raising a question for the jury. In the same case, evidence was offered to prove that the defendant, in his employment of, and instructions to A, was merely acting as president of a corporation, which A well knew. Held, it was a question for the jury, whether, in his refusal, A was acting as agent of the corporation or the defendant; and, if as agent of the former, the action was not maintainable.¹

§ 21 *d.* It has been held, that a servant may sometimes justify a positive act of force by the command of the master. Thus the bringing of his fellow-servant *vi et armis* from a conventicle or an alehouse.² So also in defence of his master. But this justification will be strictly limited to such defence. Thus, in trespass for assault and battery against A and B, A pleaded *son assault*, and B pleaded, that he was servant to A, and that, the plaintiff having assaulted his master in his presence, he, in defence of his master, struck the plaintiff. Held, on demurrer, the plea was ill; for the assault on the master might be over; and the servant cannot strike by way of revenge, but in order to prevent an injury; and he should have pleaded, that the plaintiff would have beaten the master, if the servant had not interposed, *prout ei bene licuit*. The plaintiff had judgment.³

§ 22. With regard to *the liability of the servant to the master*, (a)

¹ Delano v. Curtis, 7 Allen, 470.

² Barfoot v. Reynolds, 2 Stra. 953.

³ 2 Mod. 167.

(a) See *Tod v. Benedict*, 15 Iowa, 591. In general, *sub-agents*, acting *ex contractu*, are responsible only to the immediate agents who employ them, and not to the principals of such agents. And it is held, that the case of public officers is not necessarily an exception to this rule, although, under particular circumstances, an exception may arise. *Trafton v. United States*, 3 Story, 646.

The owner of goods has a right to waive a tort, as against factors, and to bring an action to compel them to account. He may show how the factors became pos-

sessed of the goods; and though it is proved that they became possessed of them wrongfully, still the action against them as factors will be sustained. Since he waives the tort and sues the defendants as factors, he can recover only the net proceeds, deducting charges, &c., and not the absolute value of the goods. *Lubert v. Chanviteau*, 3 Cal. 458.

The defendant was master and part-owner of a vessel, and sold her cargo, of which the plaintiff was part-owner, and received the proceeds. Held, the plaintiff might maintain an action on the case against the

it is somewhat difficult to deduce, from the authorities, any general rule, other than those which pertain to the general relation of *bailment*, (*b*) and which may be considered to include the relation of master and servant, more especially whenever *property is intrusted* to the latter. In general, a servant is not liable to the master without proof of positive neglect or wrong; or the want of reasonable care or skill.¹ Thus an agent is not liable to his principal for proving a note, due to a creditor out of the State, and therefore not barred by a discharge, in insolvency.² So an agent to sell is liable to his principal, without demand, if he neglects or refuses to render an account within reasonable time after the sale; but, after account rendered, he is not liable for the money, until demand.³ So where the cashier of a bank is employed to sell shares therein at a fixed price, but, before he has completed the sale, the bank is enjoined and proved insolvent; he is not responsible for the supposed value of the stock, no neglect on his part being shown in forwarding the sale.⁴ So it is held, that, if the servant of a common carrier accidentally lose goods intrusted to his master to carry, the master cannot maintain an action against him for the value, unless he can prove negligence, and has paid the money to the owners.⁵ So the plaintiff intrusted the defendant with goods to sell in India, agreeing to take back what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. The defendant, not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in England. Held, trover did not lie.⁶ So a banker in London, receiving bills from his correspondents in the country, to whom they had been indorsed, to present for payment, is not guilty of negligence, in giving up such bills to the acceptor, upon receiving a check upon the banker for the amount, although it turn out that such check is dishonored.⁷ And the master can enforce the liability of the servant only in the

¹ See *Natcher v. Natcher*, 47 Penn. 496.

² *Gorman v. Wheeler*, 10 Gray, 362.

³ *Haas v. Damon*, 9 Iowa, 589.

⁴ *Washburn v. Blake*, 47 Maine, 316.

⁵ *Savage v. Walthew*, 11 Mod. 135.

⁶ *Bromley v. Coxwell*, 2 B. & P. 438.

⁷ *Russell v. Hankey*, 6 T. R. 12.

defendant for his share of such proceeds.
Truce v. McGilvery, 43 Maine, 485.

(*b*) See *Bailment*.

precise form adapted to the circumstances of the case. Thus an action against a factor "for not selling for the best price," is not supported by evidence of a reduced price by reason of a delay in selling.¹ So an agent, employed to make a sale and collect the proceeds, on receiving from the purchaser a bank draft payable to his own order, is not acting in violation of his duty in reducing it into money, and passing it to his own credit in bank; and in an action by the principal, brought to recover the draft or the money, with damages for its wrongful detention, the plaintiff is properly nonsuited. The variance between the allegation and proof is not covered by the provisions of the New York code, but the allegation is unproved in its entire scope and meaning.² So it seems, that, where an agent is authorized to deliver goods to a third person, on receiving sufficient security for the amount, and delivers them without sufficient security; trover will not lie against him, but the proper remedy is an action on the case.³ So if a broker, authorized to sell goods for a certain price, sells them for a less price, the remedy is an action on the case.⁴ (a)

§ 22 a. But a servant, who takes away his master's goods upon leaving his service, is thereby guilty of a conversion, and liable in trover or replevin without demand.⁵ So the defendant, a factor, was instructed by the plaintiff, his principal, to sell wheat on consignment, at a certain price, on a certain day; or, if not then sold, to ship it to New York. On the day fixed, he gave a refusal till the next morning, and the next day perfected the sale. Held, he was liable, as for a conversion, and for the highest market price between the time of sale and a reasonable time thereafter for the commencement of an action. Also, the conversion having taken place at Buffalo, July 13, and navigation to New York having closed about November 29, that such reasonable time extended to the latter date.⁶ So it is held, that, when a party

¹ *Merle v. Hascall*, 10 Mis. 406.

² *Walter v. Bennett*, 16 N. Y. 250.

³ *Cairnes v. Bleecker*, 12 Johns. 300.

⁴ *Dufresne v. Hutchinson*, 3 Taunt. 117.

⁵ *Pilsbury v. Webb*, 33 Barb. 213.

⁶ *Scott v. Rogers*, 31 N. Y. (4 Tiff.) 676.

(a) While, as has been seen, a party is not liable for the acts of one with whom he has merely contracted, as for those of a servant; on the other hand, the liability of the latter to the former will be limited by the terms of his contract. Thus A, by a contract with a municipal corporation, undertook to construct a sewer in a public street. While in process of construction, he

omitted to keep lights and to maintain guards and barriers, and B, while passing along the street, fell into the pit, was injured, and recovered therefor a large sum from the corporation. Held, as the contract did not bind the contractor to keep lights, &c., he was not liable to the corporation. *Buffalo v. Holloway*, 3 Seld. 493.

accepts and enters upon even a *gratuitous* agency, he is bound to use such diligence as a prudent man uses in his own affairs.¹ And an agent for hire, without specific instructions, is bound to observe all the precautions ordinarily pursued in relation to the particular business in which he is employed, and according to the usage of the place, and the circumstances of the times, in which the business is transacted.² And if a factor disobeys the orders of his principal, and a loss accrues, he is answerable to the extent of that loss.³ If an agent, whose authority is limited by instructions from his principal, exceeds his commission, he is liable to him for the consequences of his unauthorized acts; and it is no excuse that his intention was to benefit his principal.⁴ So it is held to be an agent's imperative duty, to give his principal timely notice of every fact or circumstance, which may make it necessary for him to take measures for his security. Thus an agent for the investment and transmission of money is liable for every default of his sub-agent, during which, by his omission, his principal was left in ignorance of the destination of a draft purchased by him on account of his principal.⁵ And though, where a gratuitous agent collects money for his principal, he is liable for its loss only in case of gross negligence on his part; if he attempt to transmit the money without instructions, and it be lost *in transitu*, he is liable, unless the principal ratifies the act. A ratification may be implied or expressed, but there can be no ratification binding on the principal, unless made with a full knowledge of all the material circumstances of the case. When the agent makes the remittance without authority, and informs the principal of it, the dissent of the principal must be expressed in a reasonable time. When no mode of remittance is prescribed by the principal, the law prescribes a mode, and that is, the mode which a man of ordinary prudence, skill, and diligence would adopt in view of the current and usage of trade, at the locality, for transmitting his own money.⁶ So, in an action on the case for a *deceit*, the plaintiff declared, that he had employed the defendant to obtain a lease for him; that the defendant fraudulently represented, that a premium of £150 was to be paid for it, whereas only £100 were to be paid;

¹ *Anthony v. Smith*, 9 Humph. 508. See *Indianapolis (City of) v. Skeen*, 17 Ind. 628.

² *Wright v. Central, &c.* 16 Geo. 38.

³ *Day v. Crawford*, 13 Geo. 508.

⁴ *Hardeman v. Ford*, 12 Geo. 205.

⁵ *Clark v. The Bank of Wheeling*, 1st Penn. 322.

⁶ *Lyon v. Tams*, 6 Eng. 189.

by means of which fraudulent representation the defendant obtained from him the sum of £50, and converted it to his own use. Held, that these allegations were sufficient, without further stating, that the £50, so obtained, were over and above the £100 to be paid for the lease.¹ So the plaintiff employed the defendants to sell houses by auction, and to prepare a description of them; and they described two of the houses as containing three stories, whereas they contained only two. The purchaser having compelled the plaintiff, under one of the conditions of sale, to make him compensation for the misdescription; held, the plaintiff might recover the sum thus refunded.² So the defendant, being employed by the plaintiff to sell furniture for ready money only, sold it, but took in payment a bill of exchange drawn by the purchaser on a third person. The plaintiff refused to take the bill, and applied for the proceeds of the sale, but his agent afterwards obtained the bill from the defendant to get it discounted. It was never presented for payment; the drawer never had notice of its dishonor, and was thereby discharged; and ten days elapsed after it became due, before the defendant had such notice. Held, that the defendant was liable for selling otherwise than for ready money, though it seems the defendant might sustain a cross-action for any damage sustained by him, in consequence of the plaintiff's preventing him by his neglect from recovering on the bill.³

§ 23. The liability of an agent or servant may sometimes be enforced, by way of defence against a claim upon the master for the price of his services. (a) Upon this subject, it is held, that a principal is liable to his factor for all commissions, expenses, disbursements, and advancements made and accruing in the course of the agency on his account and for his benefit, *the agent exercising reasonable skill and diligence, and acting in good faith*.⁴ But an agent who is unfaithful to his trust, abuses the confidence reposed in him, and misconducts himself in the business of the agency, can recover no commissions or compensation.⁵ And in a

¹ *Pewtress v. Austin*, 2 Marsh. 217. See *Merryman v. David*, 31 Ill. 404.

² *Parker v. Farebrother*, 24 Eng. L. & Eq. 237.

³ *Earl of Ferrers v. Robins*, 5 Tyr. 705.

⁴ *Brown v. Clayton*, 12 Geo. 564.

⁵ *Sea v. Carpenter*, 16 Ohio, 412; *Myers v. Walker*, 31 Ill. 353; *Audenried v. Bettaley*, 8 Allen, 302.

(a) In an action for services in the making of a contract which is illegal and void by statute, and also for money paid on account of the principal, in the execution

thereof, the principal may defend, on the ground of the illegality. *Stebbins v. Leowolf*, 3 Cush. 137.

suit by the agent against his principal, for his expenses and disbursements, the defendant may show, in bar of the claim, the want of diligence or neglect on the part of the agent.¹ Thus, A was employed by a railroad to procure subscriptions to stock, and, in the exercise of such agency, without the knowledge of the company, received reward from persons subscribing lands for stock, for procuring their lands to be taken by the company. Held, the agency in behalf of the subscribers was inconsistent with the agency for the company, was an act of bad faith, and worked a forfeiture of all right to compensation.² So where a factor pledges goods, which are intrusted to him for sale on commission, for advances made to himself, and authorizes the pledgee to sell to reimburse himself, he is guilty of conversion; and it seems that the principal, in the settlement of accounts between him and his factor, would be entitled to an adjustment of any claim he might have, for loss or damage resulting from such unlawful pledge.³ But if the agent conducted fairly in the sale of the property, obtaining the best prices that by reasonable diligence could be obtained, and accounting honestly according to his best means, and explains his neglect to keep exact accounts, and such neglect involves no gross carelessness or dishonesty; he ought to be allowed, out of the proceeds, all the necessary expenses of managing and disposing of the goods, and a reasonable compensation for his services.⁴ And, in an action of assumpsit, brought by the principal against the agent for money in his hands, arising from the sale of goods consigned to him, if the defendant sets up in reduction of the plaintiff's demand an account for expenses incurred by him in fitting the goods for sale in market, the plaintiff cannot set up in rejoinder the negligence of the agent. He must bring his action for damages.⁵

§ 24. With regard to *the liability of a master to his servant*, for an injury done to the servant in the course of his employment for the master, the general doctrine is laid down, that a master is bound to use reasonable care and diligence to prevent accident or injury to his servant in the course of his employment, and, if he fails to do so, either personally, or by hiring incompetent servants, or providing unsuitable or defective machinery, will be held re-

¹ 12 Geo. 564.

² *Cleveland, &c. v. Pattison*, 15 Ind. 70.

³ *Kelly v. Smith*, 1 Blatch. 290.

⁴ *Jones v. Hoyt*, 25 Conn. 374.

⁵ 12 Geo. 564.

sponsible for damages.¹ In ordinary cases, where a workman is employed to do a dangerous job, or to work in a service of peril, if the danger belongs to the work itself or to the service in which he engages, he will be held to all the risks which belong to either; but where there is no danger in the work or service in itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer is liable precisely as a third person, if the loss or injury is caused by his neglect or want of care. So, if one employs a workman in a service which is apparently safe, but which becomes hazardous from causes disconnected from the service, which are not discoverable by the exercise of ordinary prudence, he is bound, by the strongest principles of morality and good faith, to disclose the danger, if known to him; and if he fails to make this disclosure, and the workman while engaged in the service thereby sustains an injury, the employer is responsible in damages.² So, although the servant has notice of the danger, if from the assurances of the master he has a reasonable expectation that the defect will be repaired.³ Thus a telegraph company is liable for injury received by a workman in its employ, through a defective telegraph pole; and the allegation of negligence is sustained, by proving the danger from the defect in the pole, and that it was known to the defendants.⁴ So a railroad is liable for injuries received by a brakeman while in their service, by the breaking of the chain, and giving way of a defective brake while working it; if they procured an improper brake, and placed the brakeman to work it, without an opportunity to know such defect.⁵ Or for injury to a brakeman, by permitting the road to become blocked with snow and ice, and a car to be out of repair, the plaintiff being in no fault.⁶ So a master is liable for injury to a servant, caused by falling from an unsafe ladder.⁷ So A, a miner, employed to work in the mine of the defendant, went down as usual to his day's work, but he and the other miners, after working a short time, held a meeting amongst themselves, to discuss certain supposed grievances, and they resolved, before working further, to

¹ *Hallower v. Henley*, 6 Cal. 209; *Noyes v. Smith*, 2 Wms. 59; *Ormond v. Holland*, 1 Ell. B. & E. 102; *Buzzell v. Laconia*, &c. 42 Maine, 113.

² *Perry v. Marsh*, 25 Ala. 659.

³ *Holmes v. Clark*, Law Reg. Dec. 1862, p. 107; 31 L. T. Exch. 356.

⁴ *Byron v. N. Y.*, &c. 26 Barb. 39.

⁵ *Columbus, &c. v. Webb*, 12 Ohio (N. S.), 475.

⁶ *Fifield v. Railroad*, 42 N. H. 225.

⁷ *Williams v. Clough*, 3 Hurl. & N.

come up from the pit at twelve o'clock, the usual hour for their coming up being five o'clock, and go in a body to represent their grievances to the defendant's manager. While so coming up, A was killed by a stone which fell from the top of the shaft, the planking there being in an unsafe state. A's representatives brought an action for damages against the defendant; and the Judge told the jury, that the defendant was not responsible for the accident, if A was at the time leaving his work without proper cause, and for a purpose of his own. The jury found that A was leaving his work without proper cause, but that he was killed owing to the unsafe state of the planking at the mouth of the pit. Held, reversing the judgment of the Court of Session, that the ruling of the Judge was wrong; that a master is liable for accidents occasioned by his neglect towards those whom he employs, while they are engaged in his employment, *eundo, morando, et redeundo*; and that, whether A had just cause for leaving his work or not, and though he were coming up for a cause of his own, still the defendant was responsible, being bound to take A up just as safely as he let him down.¹

§ 24 a. But, as already suggested, the burden of proof is on the plaintiff to show negligence.² And though bridges, passageways, or ladders, necessary to be used in going to or returning from labor, should be kept safe and convenient by the employer; and he is responsible for an injury caused by negligence and want of ordinary care in this respect, the defect occasioning the injury being known to him and not to the servant: if the defect was known to the servant, or to both servant and master, and the servant continued in the service, he assumed the risk himself. Neither can he recover, if his own neglect contributed to the injury. He must show ordinary care on his own part. And the declaration must allege, that the defect was unknown to the plaintiff, known to the defendant, and arose from the want of proper care and diligence on the part of the defendant.³ In another recent case, the less rigid rule is adopted, that the servant cannot recover, unless the employer knew, or *ought to have known*, of the defect, and the employee did not know of it, or *had not equal means of knowledge*.

¹ *Marshall v. Stewart*, 33 Eng. L. & Eq. 1.

² *Buzzell v. Laconia, &c.* 48 Maine, 113.

³ *Beaulieu v. Portland, &c.* 48 Maine, 291.

That every employer has a right to judge for himself how he will carry on his own business, and workmen, having knowledge of the circumstances, must judge for themselves whether they will enter his service. And where a boy, ten years of age, was employed in a factory, and was injured by being caught in machinery, which it was claimed ought to have been covered in such a manner as to prevent such an accident; it was held, that the question, whether at his age he had a sufficient understanding of the hazards of the employment to bring him within the general rule, was one for the jury. Also, that an action on the case for negligence was a proper remedy.¹ So when an injury happens to a servant while in the actual use of an instrument, engine, or machine, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which, is, therefore, the proximate cause of the injury, he cannot, at all events, if the evidence is consistent with his own negligence in the use of it being the real cause, nor in case of his dying from the injury can his representative, under Lord Campbell's act (9 and 10 Vict. c. 93), recover against his master, there being no evidence that the injury arose through the personal negligence of the master. Nor is it any evidence of such personal negligence of the master, that he has in use in his works an engine or machine less safe than some other which is in general use. Therefore, where a laborer was killed through the fall of a weight, which he was raising by means of an engine to which he attached it by fastening on to it a clip, and the clip had slipped off it; held, there was no case to go to the jury, in an action by his representative against the master, although it appeared that another and safer mode of raising the weights was usual, and had been discarded by the orders of the defendant.² So a servant cannot recover against the master for injuries sustained in voluntarily using an unsafe hook.³ So one having a contract with parties running a railroad, as an employee, with full knowledge of the condition and management of the road, cannot recover for injuries sustained in passing over it.⁴ So a railroad corporation, exercising reasonable care in providing and using suitable locomotive engines and tenders, are not liable for an injury occasioned by a defect therein to a workman employed by them,

¹ *Hayden v. Smithville, &c.* 29 Conn. 548.

² *Griffiths v. Gidlow*, 3 Hurl. & N. 648.

⁴ *Moss v. Johnson*, 22 Ill. 633.

³ *Dynen v. Leach*, 40 Eng. L. & Eq. 491.

while being carried over their road without paying fare. And a carpenter, employed by the day, by a railroad corporation, to work on the road, and carried on their cars to the place of such work without paying fare, cannot maintain an action against the corporation for injuries occasioned to him while being so carried, by a hidden defect in an axle, the failure to discover which, if discoverable, was occasioned by the negligence of servants of the corporation, whose duty it was to examine and keep in repair the cars, engines, and axles.¹ So an engineer upon a railroad, who has received an injury resulting from a defect in the locomotive of which he had charge, and from deficient fences, &c., must allege in his complaint, and prove, actual notice to the principal of the defects and deficiencies which occasioned the injury, or some of them. It is the duty of an engineer, confided to him by his employers, to make known to the company the defects of the engine he has the care of, and to guard against all accidents liable to happen by the escape of horses, &c., from adjoining lands, through the defect of fences or otherwise. He has the knowledge, or the means of knowledge, within his own power; and he is responsible, not only to the public, but to the company, if he does not give information of them.² So in the case of an injury to a conductor, by the insufficiency of the cars or machinery, the railroad will not be held as guarantor against the insufficiency; but will be responsible in case of injury received by a conductor without his fault, only in case of a neglect of that reasonable care and diligence as to cars and materials, which it was presumed to exercise, and in contemplation of which its employees make their engagements, and which they have a right to expect. And a conductor must use ordinary skill and judgment, not only in the management of the train, but also in the inspection of the machinery and cars, and, if he suffers any injury through want of such inspection, or from an insufficiency which he might have known by reasonable diligence, or did know, the company will not be held liable. If such injury was caused by latent defects, not discoverable, in the exercise of ordinary care, by either company or conductor, the damage therefrom must be held as among the casualties incident to the business, for which no one could be blamed. The railroad must furnish a sufficient number

¹ *Seaver v. Boston*, &c. 14 Gray, 466.

² *McMillan v. Saratoga*, &c. 20 Barb 449.

of hands for the train; if there are not enough, the conductor may refuse to run the train; if he runs the train without the proper number, he waives the obligation of the company and does it at his own risk, and, in case of injury from such running of the train, he cannot claim damages from the company.¹ The plaintiff must aver and prove, in order to recover judgment in case of injury from alleged negligence of a railroad company, besides the allegation that he did not know of the defects of the cars and machinery, that while acting as conductor he had used due care and diligence in the inspection and use of the cars and machinery while in his charge and under his direction. Between employer and employees there is no general implied warranty, that the rolling stock and fixtures of a railroad are complete and fit. But if the employer, with knowledge of a defect, suffer the road to be run, the employee being ignorant of the defect, or if, both knowing of it, the employer gives special directions as to operating, a compliance with which leads to an accident; he is liable for injuries thereby caused to the employees; and a complaint must allege substantially such negligence.²

§ 25. While, on principles of public policy, a master is liable to third persons for the misfeasance, negligence, or omissions of duty of his servant, acting within the scope of his employment; the courts have refused, upon considerations peculiar to the relation of master and servant, to apply this rule to cases, where *one receives an injury from the negligence of another*, (a) while both are acting in the common business of the same master,³ who is chargeable with no personal negligence or wrong.⁴ The law requires of masters only ordinary care to employ servants of good habits, and of competent skill and experience, and to furnish them with approved machinery and apparatus. They do not guaranty their faithfulness in carrying on the business, or keeping the works in such repair as to be always safe.⁵ It is said, "They have both

¹ *Mad River, &c. v. Barber*, 5 Ohio, N. S. 541.

² *Indianapolis, &c. v. Love*, 10 Ind. 554.

³ *Slattery v. Toledo, &c.* 23 Ind. 81; *Ohio, &c. v. Tindall*, 13 Ind. 366; *Illinois, &c. v. Cox*, 21 Ill. 20; *Griffiths v. Gidlow*, 3 Hurl. & N. 648; 3 Bosw. 591; *Walker*

v. Bolling, 22 Ala. 294; 23 Penn. 384; *Sherman v. The Rochester, &c.* 15 Barb.

574; *King v. Boston, &c.* 9 Cush. 112;

Madison, &c. v. Bacon, 6 Ind. 205.

⁴ *Carle v. Bangor, &c.* 43 Maine, 269.

⁵ *Beaulieu v. Portland, &c.* 48 Maine, 291.

(a) As will be seen hereafter, a different from the servant's *unskillfulness*. *Wright v. N. Y. &c.* 25 N. Y. (11 Smith) 562.

engaged in a common service, the duties of which impose a certain risk on each of them; and, in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk."¹ Thus, although it is the duty of a railroad company to exercise all reasonable care in procuring for its operation sound machinery and faithful and competent employees, and though they are liable to their servants for the neglect of this duty, yet, after they have procured such machinery and employees, they are not liable to a servant for injuries occasioned by the neglect of any of his co-servants employed in the same general business of operating the road, even though the negligent servant in his grade of employment is superior to the one injured.² Thus where a laborer on a gravel-train, riding in a gravel-car from his boarding-place to the place of his work, is injured through the carelessness of the engineer, or by a collision, caused by the negligence of the company's servants in charge of the train; the railroad corporation are not responsible.³ More especially where by agreement he is carried free of charge.⁴ So a brakeman, whose duties are to apply the brakes when directed by the engineer or conductor, cannot maintain an action against the railroad company for injuries caused by the negligence of their superior officers, in running the train at unsafe speed, or other negligence.⁵ So the plaintiff was employed as a trackman, to follow in a hand-car passenger trains over a certain part of the defendants' road-track, to keep it in order and report defects; and, while engaged in this duty in the evening, was run over and injured by a train of the defendants' cars, without lights, not usually passing at that hour, and through negligence, as was claimed, of its managers. Held, the defendants were not liable.⁶ So, to an action by an administratrix against a railway for damages occasioned by

¹ *Hutchinson v. The York, &c.* 5 Exch. 343, 351.

² 32 Verm. 473.

³ *Ryan v. Cumberland, &c.* 23 Penn. 384; *Gillshannon v. Stony Brook, &c.* 10 Cush. 228.

⁴ *Russell v. Hudson, &c.* 17 N. Y. 134.

⁵ *Sherman v. Rochester, &c.* 17 N. Y. 153; *Chamberlain v. Milwaukee, &c.* 7 Wis. 425.

⁶ *Coon v. The Syracuse, &c.* 1 Seld. 492.

the negligence of the company, by their servants, in moving trucks against another truck, which the deceased was assisting in turning, and by such negligence causing his death, it is a good defence, that he was voluntarily assisting the servants; that they were persons of ordinary skill, and competent to move trucks safely, and that their negligence was unauthorized by and without the knowledge of the company. And such defence is admissible under the plea of *not guilty*.¹ So the plaintiff, an employee of the defendant, a railroad, was employed by the month to render service generally on the road, in the capacity of baggage-master, conductor of passenger-trains and gravel-trains, at such times and places along the road as directed; and, being ordered to go to F. and take charge of a gravel-train, the next day, at that place, took passage on the train for F., but passed by F. to T., and on the morning of the next day returned, by the same train towards F., to take charge of the gravel-train as directed. Before arriving at F., by the carelessness of the servants operating the passenger-train, he was thrown from the car and injured, and brought his action against the company for damages. Held, the plaintiff, although having no duties to perform on the passenger-train, was to be regarded as an employee of the defendant; and his relation of fellow-servant to the employees operating the train entitled the plaintiff only to the exercise on their part of ordinary care, and not that extraordinary care due to a common passenger.² So a carpenter, employed by the day by a railroad to work on the line, and carried on their cars to the place of such work without paying fare, cannot maintain an action against the corporation for injuries occasioned to him while being so carried, by the negligence of the engineer, or by a hidden defect in an axle, the failure to discover which, if discoverable, was occasioned by negligence of servants of the corporation, whose duty it was to examine and keep in repair the cars, engines, and axles.³ So A, the plaintiff's intestate, an engine-driver on the defendants' railroad, was killed by the explosion of the locomotive, which occurred in consequence of the neglect of B, the defendants' master mechanic, to keep the locomotive in repair. The duty of B was to superintend and direct the repairs of all the locomotives. The directors furnished their road in the first in-

¹ Degg v. Midland, &c. 3 Jur. N. S. 395.

² Seaver v. Boston, &c. 14 Gray, 466.

³ Manville v. Cleveland, &c. 11 Ohio (N. S.), 417.

stance with suitable machinery and faithful and competent employees, and they were ignorant of any defect in the locomotive. Held, the defendants were not liable.¹ So where an employee, in entering the building of his employer, in the ordinary course of his business, falls through an open hatchway and is killed, and the evidence given tends only to the conclusions, that, whenever the hatchway was rightfully opened, it was by the order of the defendant or of a particular agent, and that in the latter case such agent always stood by it, when it was open, to guard against accidents, and that on the occasion in question it was opened without the knowledge or permission of such particular agent or of the defendant, by the unauthorized act of a fellow-servant of the deceased; the conclusion of law is, that the deceased, if himself without fault or negligence, was killed not by the neglect or default of his employer, but of his fellow-servant. A verdict for the plaintiff, upon this evidence, will be set aside as contrary to evidence.² Nor is it material that the plaintiff is under age.³ Nor, as already suggested, that both servants were not in the same employment.⁴ It is sufficient that both servants are engaged in *the same general business*; that, though the employments of the agents are distinct, both are necessary in the prosecution of a common enterprise.⁵ Nor is it material that the injured party has a grade of employment inferior to that of the other.⁶ And the general rule more especially applies, if the plaintiff was a mere volunteer;⁷ or if the plaintiff himself has also been guilty of negligence. Thus, where several servants were engaged in the same work, and one of them was injured by an act of negligence in which all participated, the master being absent at the time; held, in a suit brought against the master for the injury, that the servant could not recover, though the act complained of was done under the superintendence of a servant appointed by the master.⁸ The rule also applies to a person who is injured, whilst voluntarily assisting the servants in their work. Therefore, where the servants of the defendants, a railway company, were turning a truck on a turn-table, and A, not in the employment of the defendants, volunteered to assist them, and, whilst

¹ Hurd v. Vermont, &c. 32 Verm. 473.

² Karl v. Maillard, 3 Bosw. 591.

³ King v. Boston, &c. 9 Cush. 112; Brown v. Maxwell, 6 Hill, 592.

⁴ Ryan v. Cumberland, &c. 23 Penn. 384; Gillshannon v. Stony Brook, &c. 10 Cush. 228.

⁵ Coon v. The Syracuse, &c. 1 Seld.

492; Karl v. Maillard, 3 Bosw. 591.

⁶ Hurd v. Vermont, &c. 32 Verm. 473.

⁷ Degg v. Midland, &c. 3 Jur. N. S. 395.

⁸ Brown v. Maxwell, 6 Hill, 592.

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so engaged, other servants of the defendants negligently propelled a steam-engine, and thereby caused the death of A, and the servants were persons of competent skill, and the defendants did not authorize the negligence; held, the defendants were not liable to an action by the personal representative of A.¹

§ 25 a. Various exceptions, however, have been engrafted upon the general rule above stated. (a) Thus it is held, that, upon the ground of the public obligation resting upon a railroad corporation, to keep their road safe for all legally upon it, not because of the contract between the companies, to which he was not privy; the engineer of a railroad company, conducting a train over a section of road belonging to another corporation, in accordance with a mutual contract so to do, may recover damages against that corporation, for injuries sustained by reason of the negligence of one of its servants.² So the rule, that the principal is not liable to one agent, for an injury occasioned by the negligence or misconduct of another, does not apply to *slaves*. Thus where a slave, hired as carpenter on board a steamboat, is killed by the misconduct of the master, the owner of the steamboat is liable.³ So the plaintiff, a servant of J. & Co., who were employed by the defendants to carry the cotton from a warehouse, was receiving the cotton into his lorry, when through the negligence of the defendants' porters a bale fell upon him. Held, the plaintiff and the porters were not so in the same employ, or engaged in a common object, as to take away the plaintiff's right of action.⁴

§ 25 b. Another exception to the rule has been the subject of somewhat conflicting views in late English cases. Thus where the plaintiff, a painter in the employ of the defendant, sustained an injury from the failure of a scaffolding upon which he was working, and which had been erected by another servant of the defend-

¹ Degg v. Midland, &c. 40 Eng. L. & Eq. 376.

² Scudder v. Woodbridge, 1 Kelly, 195.

³ Sawyer v. Rutland, &c. 1 Williams, 143.

⁴ Abraham v. Reynolds, 5 Hurl. & Nor.

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(a) In a late case in Wisconsin, it is held, that the employer is liable to one servant for injuries caused by the carelessness of another. The servant assumes the risks necessarily incident to the employment, but the employer must see to it that all his servants are careful and vigilant. And it is immaterial, whether the negligent person was a co-servant of the injured person, or a servant in another department, or a super-

intendent. Thus an express agent, lawfully travelling on the road, in care of express freight, was hired by the superintendent to act as brakeman during one trip, and thrown from the cars and injured, by the negligence of the engineer. In an action against the road, held, he was a servant of the corporation. *Chamberlain v. Milwaukee, &c.* 11 Wis. 238.

ant; it was held a wrong instruction, that, if the scaffolding was erected under the personal direction and interference of the defendant, and was insufficient, or *if the person employed by the defendant to erect it was incompetent*, the plaintiff was entitled to recover.¹ But, in this case, the qualification of the general rule is recognized, that a master is not held responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant, while they are acting in one common service; *provided the latter is a person of ordinary skill and care, and the master uses reasonable care in his selection, and furnishes him suitable means to perform the service.* Thus the servant of a railway company cannot recover from them for an injury caused by the falling of a bridge, unless the company was negligent in employing incompetent persons to build the bridge, or was otherwise at fault in respect to defects on the bridge.² So the defendants, being the contractors for large works, employed M to do part of the works by the piece, for a certain sum payable by monthly instalments, according to the work done, the defendants finding the tools. W, who was then in the defendants' service, was taken by M from his work, and put to assist in the piece-work at weekly wages, but, in accordance with the general regulations at the defendants' works, W was paid his wages weekly by the defendants with their other workmen. M, who, before the contract piece-work, had also been in the defendants' employment, at weekly wages, drew from the defendants money in that character, the whole being charged against him, and deducted from the amount of the instalments when payable. W having been killed while at work on the piece-work, by the negligence of the defendants' servants; held, that W and M were both the servants of the defendants, and therefore that the administratrix of W could not maintain an action against the defendants for the negligence of the defendants' other servants, *who were reasonably fit and competent for the service in which they were employed.*³ And the officer, having charge of that department of the business in which the injury occurred, is the party from whom the law exacts suitable care in this respect. Hence evidence is admissible,

¹ Tarrant v. Webb, 37 Eng. L. & Eq. Hill, 592; Fox v. Sandford, 4 Sneed, 36; 281. Frazier v. Penn. R. R. 38 Penn. 104;

² M'Dermott v. Pacific, &c. 30 Mis. 30 Mis. 115; Ponton v. Wilmington, &c. 6 Jones, 245; Illinois, &c. v. Cox, 21 Ill.

³ M'Dermott v. Pacific, &c. 30 Mis. 115; 20; Michigan, &c. v. Leahy, 10 Mich. 193; Wiggitt v. Fox, 36 Eng. L. & Eq. 486; 6 Sullivan v. Mississippi, &c. 11 Iowa, 421.

that he was ignorant of the carelessness of the employee by whose fault the accident was caused.¹

§ 25 *c.* And the general rule does not apply to an injury, caused in part by the negligence of the employer. Thus an engine-man, in the employ of railroad A, but running their train, by agreement of the companies, on railroad B, was killed, without negligence on his part, but owing to the negligence of a switch-tender employed by railroad B (the defendants), and the insufficiency of their switch. It appeared that an improved form of switch was known to the defendants, and they had it in their power to apply it, which would reduce materially the risk of accident, and that the neglect to employ this improvement caused the accident. Held, the defendants were liable to the administratrix.² (*a*)

§ 25 *d.* And it has been doubted whether the rule applies, where the employment of the servant who is injured is wholly distinct from that of the servant by whose negligence the injury was occasioned.³ Thus it was held, though this decision appears to have been overruled (see § 25), not to apply to the case of a day laborer employed by a railroad company from day to day, who was injured in returning from work on the company's cars, through an accident occasioned by the misconduct of the engine driver.⁴ So the plaintiff was in the employ of a railroad company, his business being, with other laborers, to ballast part of their road, excavating gravel from certain banks, loading it in gravel cars, and then distributing it along the track. Some of the workmen, among them the plaintiff, lodged in a village two miles from the gravel banks, and, by agreement with the company, were to be conveyed to the village for meals and lodging, and then back to the banks. While so employed, the plaintiff, during his conveyance on a gravel-car to the banks, to work, by the gross negligence of the engineer of the train he was riding on, was injured. Held, the company was liable.⁵ And where a contractor, engaged in repairing a bridge upon a railroad for the company, employs men to work thereon by the day; they are his servants, not those of

¹ *Frazier v. Pennsylvania*, &c. 38 Penn. 104.

² *Russell v. Hudson*, &c. 5 Duor. 39.

⁴ *Ibid.*

³ *Smith v. New York*, &c. 6 Duor. 225; 10 Mich. 193; 11 Iowa, 421.

⁵ *Fitzpatrick v. New Albany*, &c. 7 Ind. 436.

(*a*) But, on the other hand, a party who was himself in fault, cannot recover; as, for example, a brakeman, who had knowledge of the habitual carelessness of the conductor; although the company also knew it. 38 Penn. 104.

the company; and between them and the company there is no privity. If a man thus employed receives an injury from a passing train while at work upon the bridge, caused by the negligence of the company's servants or agents, in charge of the train, without any fault or negligence on his part; he may maintain an action against the company.¹ So in an action to recover for injuries received through a defective highway; it appeared that the plaintiff was on duty July 4, 1858, in the evening, as a special police-officer for that night only. While in First Street, he fell into a hole in the sidewalk, spraining and partly dislocating his ankle-joint, which resulted in confining him to his house for some four weeks, and keeping him lame thereafter for some months. The defendant contended at the trial, that he was not liable, because the plaintiff, at the time, was in the employ of the city, and the accident happened through the fault and negligence of other employees of the city in not repairing the street. Held, this principle of law did not apply to the case.²

§ 26. When an agent is employed by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong (as to take personal property, which, although claimed adversely by another, he has reasonable ground to believe belongs to his principal), the law implies a promise of indemnity by the principal, for such losses and damages as flow directly and immediately from the execution of the agency. And, on such promise, case and assumpsit are equally maintainable; but, in either action, the declaration must allege a breach.³ Thus an agent, who, acting under the direction of his principal, cuts down timber on the land of a third person, may recover of his principal the amount of a judgment recovered against him for the trespass by the owner of the timber cut, his principal having received and disposed of the timber.⁴ If the declaration is in case, to recover indemnity from the principal, for damages recovered in trespass against the agent, by the true owner of the property taken; it must negative the existence of any knowledge on the part of the agent at the time of the taking, that he was committing a trespass, although the *onus* of proving such knowledge may be on the principal.⁵

§ 26 a. With regard to the right of the master to *chastise* his

¹ *Young v. New York, &c.* 30 Barb. 229.

² *Kimball v. Boston*, 1 Allen, 417.

³ *Moore v. Appleton*, 26 Ala. 633; *Law*
Reg. May, 1863, p. 440, N. Y.

⁴ *Drummond v. Humphreys*, 39 Maine,
347.

⁵ *Moore v. Appleton*, 26 Ala. 633.

servant, it has been held that a master has no right to flog a choir-boy of a cathedral for singing at private parties without his leave.¹

§ 26 *b*. In reference to the *dismissal* of a servant, if a person, hired on an annual service, as *clerk*, claim to be *partner*, although in a respectful manner and *bonâ fide*, he may be dismissed without notice.² So the purchase by the servant, without the master's knowledge, of a large quantity of an article used by the master in his business, which property was invoiced and delivered to one A, who allowed the servant to have such part thereof as was needed in the master's business; with a denial of the purchase, when first charged with it by the master; together with the further fact, that the vendor made claim upon the master for part of the price: is sufficient to support a verdict of dismissal for justifiable cause.³

§ 26 *c*. Where a party has entered into a contract to serve another for a year, and is wrongfully dismissed by his employer before the expiration of his time of service, he may bring an action immediately for any special injury which he may have sustained by such dismissal.⁴

§ 26 *d*. Where *an apprentice* is not a party to the indenture of apprenticeship, his remedy for non-performance by the master is by an action on the case.⁵

§ 27. In reference to the question, whether *the right of action for an injury committed by a third person* is in the master or the servant; it is held that an action on the case lies in the name of the principal, for a false representation made to the agent, whether he be a factor, commission merchant, or clerk.⁶ So where an agent, without disclosing the name of his principal, makes a contract with a common carrier to transport the property of the principal, the latter may maintain an action in his own name against the carrier, to recover damages for the loss of the property.⁷ So in a suit for fraud in the sale of real estate, the fraudulent representations were made to an agent, who assigned his interest in the cause of action to his principal. Held, the assignment was of no legal effect, as the cause of action was in the principal with-

¹ Newman v. Bennett, 2 Chit. R. 195.

² Amor v. Fearon, 1 Per. & Dav. 398.
See Lane v. Phillips, 6 Jones, 455; Coffin v. Landis, 46 Penn. 426.

³ Horton v. McMurtry, 5 Hurl. & Nor. 467.

⁴ Rogers v. Parham, 8 Geo. 190.

⁵ McGunigal v. Mong, 5 Barr. 269.

⁶ Raymond v. Howland, 12 Wend. 176; Tuckwell v. Lambert, 5 Cush. 23.

⁷ Elkins v. Boston, &c. 19 N. H. 337.

out an assignment.¹ So a factor, or his assignees and representatives, are trustees of the principal, so long as any article originally bailed to them, or the proceeds thereof in money or other form, remain in their hands; and the principal may recover such article or money, on the insolvency of the holders, if he can still trace it to them; unless they should pay it away, in their representative character, before notice of the claim.²

§ 27 *a*. But a servant, finding a chattel in the house of his master, who voluntarily assumes the custody of it for the servant's benefit, may maintain an action of trover against a wrong-doer who converts it.³ So a servant may maintain an action of tort for an injury to himself, although an action for breach of contract connected with such injury must have been brought by the master. Thus a servant, travelling with his master on a railway, may have an action in his own name against the company for the loss of his luggage, although the master took and paid for his ticket. The liability of the company is independent of the contract.⁴ So one railroad is liable to the servant of another for an injury caused by the fault of the former.⁵ And master and servant may also bring separate and successive actions against the same party for an injury to the servant. Thus, in case of the battery of a servant. And recovery in one action may not be pleaded in bar of the other.⁶

§ 28. This leads to the further remark, that an action lies in favor of the master against a third person, for *an injury done to the servant*, whereby the master is deprived of his service. Thus the hiring of a person of full age, for wages by the year, creates the relation of master and servant, and enables the employer to maintain *case* against one who imprisons the person employed, for the loss of his services.⁷ And in order to maintain such action, it is not necessary that the servant be hired at any certain wages or salary.⁸ So it was held that the plaintiffs might sue the defendant in case, for loss of services of their traveller, by an accidental collision with the defendant; that the damage was not too remote, though trespass would have been the proper remedy had the servant been the plaintiff.⁹ And, in such action, the *damage* alone is

¹ Cramer v. Wright, 15 Ind. 278.

² Fahnestock v. Bailey, 3 Met. (Ky.) 48.

³ Mathews v. Harwell, 1 E. D. Smith, 393.

⁴ Marshall v. York, &c. 7 Eng. L. & Eq. 519.

⁵ Smith v. New York, &c. 19 N. Y. (5 Smith) 127.

⁶ Savill v. Kirby, 10 Mod. 385.

⁷ Woodward v. Washburn, 3 Denio, 369; White v. Smith, 12 Rich. 595.

⁸ Martinez v. Gerber, 3 Scott, N. 386.

⁹ Martinez v. Gerber, 386; 3 M. & Gr.

not the cause of action, but the illegal act and the damage together. Hence, in an action for permanently injuring the hand of an apprentice, whereby loss of service accrued, the master may recover for *prospective* damage. He could not bring a fresh action as often as fresh damage resulted.¹ So, in an action of trespass, for forcibly invading a plantation, carrying off some of the slaves, and frightening all the others away, the plaintiff may give in evidence the consequential damages necessarily resulting from the loss of hands, including the loss of cord-wood floated off by the rising of the river, and the injury to the corn-crop by the neighbor's cattle breaking into the corn-field.² So for loss of service a master can recover, though pregnancy did not follow seduction, and venereal disease did.³ (See chap. 43.) But an action does not lie for the loss of service of a servant, caused by an accidental collision.⁴ And where two members of a patrol company, while on duty, hailed a slave at night, who was riding into a village; and the slave attempted to escape, whereupon the patrol fired on him, and inflicted wounds of which he died: held, the patrol were not liable to the master for damages.⁵ (a)

§ 29. An action also lies, for *seducing a journeyman* to leave his employer.⁶ So the rule is not confined to *menial* servants, or to such as fall within *the statute of laborers*, but extends to all cases, where there is an unlawful or malicious enticing away of a person employed to give his exclusive personal service, for a given time, under the direction of an employer, who is injured by the wrongful act; and wherever there is at the time of the persuading a binding contract, whether the service be then actually subsisting or not. Thus a declaration by the lessee of a theatre charged, that one J. W. had contracted with the plaintiff to sing, during a certain term, at his theatre, and not elsewhere, without the plaintiff's consent, and that the defendant had during the term maliciously enticed and procured J. W. to depart from her said contract, against the will of the plaintiff, whereby J. W. refused to

¹ *Hodsoll v. Stallebrass*, 3 Per. & D. 200;

¹¹ Ad. & Ell. 301.

² 13 How. 447.

³ *White v. Nellis*, 31 Barb. 279.

⁴ *Martinez v. Gerber*, 3 Scott, N. 386.

⁵ *Duperrier v. Dautrive*, 12 La. An. 664.

⁶ *Hart v. Aldridge*, Cowp. 54, cited in 6 Mod. 101.

(a) As to the right of action for injuries to slaves, more especially in reference to the *directness* or *remoteness* of the cause of injury; see *Wright v. Gray*, 2 Bay, 464; *Mo-*

Daniel v. Emanuel, 2 Rich. 455; *Duncan v. S. C., &c.* Ib. 613; *Sedgw. on Damages* (3d ed.) 92 n. w.

sing for the plaintiff at his theatre during the whole of the term. Also, that J. W. had been hired by the plaintiff as, and was, his dramatic artiste, for a certain term, and that the defendant had maliciously enticed and procured her to depart from her said employment during the said term. All the counts alleged special damage. On demurrer, held, that the action was maintainable at common law.¹ So the defendants invited the plaintiff's servants to dinner, and induced them to leave him; whereby the plaintiff lost the profits of sales of pianos for two years. Held, the plaintiff might recover damages for such loss, although the servants were not hired for any specific time, but worked by the piece.² So an action will lie, for *continuing* to employ the servant of another after notice, though the employer did not procure the servant to leave his master, or know when he employed him that he was the servant of another.³ So it is not necessary to show, that an apprentice actually ran away from, or rebelled against, his master, to support an action under an act, which provides for a suit against any one who "counsels, entices, and persuades" him so to do.⁴

§ 80. But, to maintain an action for enticing away a servant, there must be proof of a service owing to the plaintiff, by virtue of an agreement of the servant or one authorized to bind him.⁵ And though an action on the case lies for seducing and harboring the slave or servant of the plaintiff, notwithstanding a *penalty* given by statute, which is a cumulative remedy;⁶ yet no action lies for seducing a servant from his master, if the servant has paid the penalties stipulated by his articles for leaving him. As where the master had recovered the penalty in an action of debt brought by him against the servant before he commenced the present action; although the debt and costs were not actually paid to him till after the commencement, though before the trial of it.⁷ In general, the measure of damages is the value of the service during the time complained of; but is held, under special circumstances, to be the full value of the servant.⁸

§ 81. An action for enticing and harboring an apprentice cannot be maintained, without proof of the defendant's knowledge of that

¹ *Lumley v. Gye*, 20 Eng. L. & Eq. 168.

² *Gunter v. Astor*, 4 Moo. 12.

³ *Blake v. Lanyon*, 6 T. R. 221.

⁴ *Holliday v. Gamble*, 18 Ill. 35.

⁵ *Campbell v. Cooper*, 34 N. H. 49.

⁶ *Scidmore v. Smith*, 13 Johns. 322.

⁷ *Bird v. Randall*, 3 Burr. 1345; 1 W. Bl. 387.

⁸ *Dubois v. Allen*, Anth. N. P. 94.

relation.¹ So in an action on the case for employing a runaway slave, alleging notice that the negro was the runaway slave of the plaintiff; he must prove the *scienter*, unless from the circumstances the law would presume it.² And an action on the case, brought by a father for the enticing away of his son from his service, is not supported by proof that the defendant, knowing that the son had left his father's service without his father's consent, induced him to enter into the service of the defendant, and detained him when he wished to return.³

¹ *Stewart v. Simpson*, 1 Wend. 376.

² *Butterfield v. Ashley*, 2 Gray, 254.

³ *Bell v. Lakin*, 1 M'Mullan, 364.

CHAPTER XLI.

MASTER AND SERVANT.—PRINCIPAL AND AGENT.—ATTORNEYS, ETC.,
AT LAW.

1. General liability of an attorney.
4. In reference to *suits*.
5. The collection, &c., of money.
6. *Securities and titles*.

7. Negligence, whether a defence to a suit for fees.
8. Liability to parties wrongfully sued.

§ 1. A PECULIAR class of *agents* consists of *attorneys at law*, whose rights, duties, and liabilities may therefore properly be considered in the present connection.

§ 2. It is held, that the highest degree of *fairness and good faith* is expected and exacted of attorneys in their dealings with clients;¹ (a) and that an attorney is responsible for *ordinary skill, diligence, and care* in the exercise of his profession;² and is liable for *ordinary neglect*; and the skill required has reference to the character of the business which he undertakes to do.³ (b) It is said: "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to fur-

¹ Jennings v. McConnell, 17 Ill. 148. See Mauro v. Buffington, 26 Mis. 184; Rice v. Commonwealth, 18 B. Mon. 472; Brown v. Brown, 4 Ind. 627; Zug v.

Laughlin, 23 Ind. 170; Juday v. Trustees, &c. Ib. 272; Bougher v. Schohey, Ib. 583.

² Holmes v. Peck, 1 R. I. 242.

³ Cox v. Sullivan, 7 Geo. 144.

(a) Courts of chancery have jurisdiction, in all cases between client and attorney, in which the latter has taken advantage of his position to defraud the former. And the burden of proof is on the attorney, to show the fairness of their transactions. Jennings v. McConnell, 17 Ill. 148. (See p. 484.)

There are no transactions which courts of equity will scrutinize with more jealousy than dealings between attorneys and their clients, especially where the latter are persons of inferior capacity and inexperienced in business. Mills v. Mills, 26 Conn. 213.

In reference to the general rule, that an attorney cannot avail himself of any advantages derived from a purchase of the subject of litigation or a purchase for his client; see West v. Raymond, 21 Ind. 305; Lashley v. Cassell, 23 Ind. 600; Eshleman

v. Lewis, 49 Penn. 410; Annan v. Stout, 42 Penn. 114; Adams v. Fox, 40 Barb. 442.

(b) An attorney or solicitor, who, on payment of his bill, delivers up papers that have been entrusted to him, is bound to deliver them up in a reasonable state of arrangement, so that the party to whom they are delivered may not be put to unreasonable trouble in sorting them. North-western, &c. v. Sharp, 28 Eng. L. & Eq. 555.

It is no answer for an attorney, when sued in detinue for a deed which has been intrusted to him by a client, to say simply that he has lost it. Reeve v. Palmer, 5 C. B. (N. S.) 84.

The client is not bound to any diligence, unless stipulated for. Cox v. Sullivan, 7 Geo. 144.

nish in the conduct of a cause is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa* mentioned in some of the cases for which he is undoubtedly responsible."¹ And, with regard to the precise measure of an attorney's liability; on the one hand it is held to be a fair presumption, that an attorney acts according to the instructions of his client, unless in a case of such gross negligence that a violation may be inferred.² (See p. 488 n.) It is said: "Attorneys ought to be protected when they act to the best of their skill and knowledge; and I should be very sorry that it should be taken for granted, that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt, which he was employed to recover for his client, from the person who stands indebted to him."³ So it is held, that an attorney is liable only for *gross negligence* or *gross ignorance*; and is entitled to the benefit of the rule, that every one shall be presumed to have discharged his legal and moral obligations, until the contrary shall be made to appear. And, when made to appear, the extent of the damages must also be affirmatively shown. Thus, where the amount of a note is alleged to have been lost by his negligence, it must be shown that it was a subsisting debt against the maker, and also that he was solvent. Unless the latter be shown, he would be liable only for nominal damages; and under no circumstances would he be liable for more than the actual damages sustained by his negligence.⁴ (See p. 488.)

§ 3. But on the other hand it has been held, that under some circumstances the law throws upon an attorney regularly employed to conduct a cause, the burden of proving that his client has not been injured by his negligence in that behalf. Thus, where the defendant, an attorney, was sued for negligence in allowing judgment to go by default in an action which the plaintiff had retained him to defend; the negligence being proved, held, it was for the attorney to defend himself by showing that the plaintiff had no defence in that action, and not for the plaintiff to show that he had a good defence, and so had been damaged by the judgment by default.⁵ What is reasonable care and skill, is a question for the

¹ Per Tindal, C. J., *Godefroy v. Dalton*, Burr. 2061. See *Godefroy v. Dalton*, 6 Bing. 460, 467.

² *Holmes v. Peck*, 1 R. I. 242.

³ Per Ld. Mansfield, *Pitt v. Yalden*, 4

Bing. 467.

⁴ *Pennington v. Yell*, 6 Eng. 212.

⁵ *Godefroy v. Jay*, 7 Bing. 413.

jury. The judge is not bound to define it.¹ The testimony of *experts* is sometimes admissible.² (a)

§ 4. The most frequent claims against attorneys relate to alleged negligence in connection with *suits at law*. Thus it is held, that an attorney, bringing an action for his client, within a limited jurisdiction, on a cause of action arising out of such jurisdiction, is liable for negligence.³ So an attorney, before he takes upon himself to sue out a writ in a court of peculiar constitution, is bound to ascertain that the court has machinery to carry out the object of the action.⁴ So, where an attorney for the plaintiff suffered the case to be called on, without previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived, in consequence of which the plaintiff was nonsuited; in an action against him for negligence, held, that it was properly left to the jury to say, whether he had used reasonable care in conducting the cause; and, the jury having found in the negative, the Court refused to disturb the verdict.⁵ (b) So an

¹ *Parker v. Rolls*, 14 Com. B. 691; 6 Eng. 212.

² *Pennington v. Yell*, 6 Eng. 212.

³ *Williams v. Gibbs*, 6 Nev. & Man. 788.

⁴ *Cox v. Leech*, 38 Eng. L. & Eq. 271.

⁵ *Reece v. Rigby*, 4 B. & Ald. 202.

(a) In an action against an attorney for negligence, as such, the fact that the plaintiff continued to employ him, after knowing of such negligent conduct, is evidence on the question of damages. *Derrickson v. Cady*, 7 Barr, 27.

Proceeding on motion against an attorney for money collected is no bar to a recovery in an action on the case for damages. *Coopwood v. Baldwin*, 25 Miss. 129.

Partnerships between attorneys are subject to the incidents to mercantile partnerships; and one partner is liable on the contracts made by the other within the scope of the partnership business, and for his negligence in respect to a partnership contract; and a right of action against the firm survives against the survivor alone. *Livingston v. Cox*, 6 Barr, 360.

(b) In a suit against an attorney for neglecting to defend an action, his declarations made to the Court when the action was called on for trial, that he had no defence to make, because his client, though requested to instruct him in a defence, had not done so, are admissible in evidence; not to prove the truth of the facts stated, but the circumstances which occurred at the time of the alleged negligence. *Salisbury v. Gourgas*, 10 Met. 442.

When an attorney is sued by his client

for negligence and unskilfulness, he cannot set up champerty in the contract as a defence. *Goodman v. Walker*, 30 Ala. 482.

Nor that he consulted a distinguished attorney respecting the proper course to be pursued by him, or that the arrangement made by him was, in the opinion of the witness, the best that could be made for his client's interest. *Ib.*

An attorney is responsible for losses caused by his disregard, in bringing a suit, of a rule of law which was well and clearly defined, both in the text-books and the reports, and which had existed and been published long enough to justify the belief that it was known to the profession. *Ib.*

An attorney's receipt for a claim, placed in his hands for collection, is admissible evidence against him, in an action for negligence and unskilfulness, to prove the relation of attorney and client; and the record of the suit on the claim is also admissible against him, to prove the final determination of that suit, although it was conducted by him in the name of another attorney. *Ib.*

In an action against attorneys for negligence and unskilfulness, a count is sufficient, which alleges that they conducted the suit so negligently and unskilfully, "in not having a certain writ of attachment, affidavit, and declaration, before then pre-

attorney is bound to sue out the proper process against bail.¹ So against an officer for taking insufficient bail, or not delivering over the bail-bond.² So he is bound to deliver an execution to an officer in season to preserve an attachment.³ But not to attend in person to the levy of an execution.⁴ Nor search for property.⁵ Nor to convey to a sheriff his client's directions for seizing goods on an execution.⁶ But an action lies against an attorney, for neglecting to charge a person in execution at his client's suit, according to a rule of court; although the omission was rather from want of judgment than from negligence. And, in such action, the question, what is reasonable skill, is for the jury.⁷ So, when an attorney takes the responsibility of dismissing a suit, on receiving in payment claims against other parties, he renders himself liable for the amount of the claim on which the action was founded, unless he proves that a judgment on that claim would have been of no value.⁸ So, it seems, an attorney is liable for re-

¹ *Dearborn v. Dearborn*, 15 Mass. 316; 6 Eng. 312.

² *Simmons v. Bradford*, 15 Mass. 82; *Crooker v. Hutchinson*, 1 Verm. 73.

³ *Phillips v. Bridge*, 11 Mass. 242, 246.

⁴ *Williams v. Reed*, 3 Mas. 405; *Pennington v. Yell*, 6 Eng. 212.

⁵ 6 Eng. 212.

⁶ *Ford v. Williams*, 3 Kern. 577.

⁷ *Russel v. Palmer*, 2 Wils. 325.

⁸ *Coopwood v. Baldwin*, 25 Miss. 129.

pared by them in said action, prepared, drawn up, and filed, and made out according to the laws of said State and rules of said Court, that the said plaintiff, by the said neglect of, &c. was hindered and prevented from recovering judgment, &c., and was forced and compelled to release and dismiss the levy of said writ of attachment; or "by reason whereof the said plaintiff has been prevented from recovering her demand," &c. Or a count which alleges that the defendants, through want of care and skill, "did dismiss the levy of a certain writ of attachment," before that time levied on the property of the defendants therein, and "did dismiss, relinquish, and release all liens which had attached or accrued by virtue of said levy," &c., and that, by means of the unskilful management of the defendants, the plaintiff "lost her said demand, and the means of recovering and collecting the same." *Walker v. Goodman*, 21 Ala. 647.

The distinction is made, that, when an attorney undertakes the collection of a debt, it becomes his duty to sue out all processes, both mesne and final, necessary to effect that object; and not only the first execution, but all such as may become necessary. Also, to pursue bail, and those who may have become bound with the defendant, in the progress of the suit, either before or

after judgment. But not to institute new collateral suits, without special instructions, such as actions against the sheriff and clerk for the failure of their duty. *Pennington v. Yell*, 6 Eng. 212.

When an attorney died, twelve days before the return-day of an execution, in a case where real estate had been attached by the original writ, without having levied the attachment, and the attachment, not being subsequently levied, was lost; it was held, that the attorney was not liable for damages for the loss of the attachment. *Holmes v. Peck*, 1 R. I. 242.

So where, a trader having petitioned the Court of Bankruptcy under the 211th section of the 11 & 13 Vict. c. 106, an order was made under § 219, that his estate and effects should be possessed and received by the official assignee, and be taken possession of by the messenger; and one of the creditors employed the plaintiff (an attorney) to prepare an assignment of his effects for the benefit of the general body, informing him that all would concur therein; and, the assent of all the creditors not having been obtained, the assignment became unavailing: it was held, that the plaintiff was not guilty of gross ignorance or gross negligence in preparing the assignment under such circumstances. *Lewis v. Collard*, 14 Com. B. 208.

ceiving payment of a claim in depreciated money.¹ So an attorney cannot abandon a cause which he has undertaken for want of funds, without reasonable notice to his client. Thus where an attorney notified the client, five days before the commission day, that he would not deliver briefs unless supplied with funds for fees of counsel, and, they not being furnished, counsel were not instructed, and a verdict was rendered against the client; held, the attorney was liable for negligence, if the jury should find that he had not given reasonable notice.²

§ 4 *a*. An attorney is not liable for not setting up in defence facts communicated to him by his client, without proof of them, and showing that they could have been proved by the exercise of proper diligence.³ Nor for failing to apply for a new trial upon a point of law.⁴

§ 5. In regard to the *collection and appropriation of money*, it is held, that an attorney, who takes a note to collect, is not chargeable with it, unless he has received the money and refused to pay it over, or unless he might have made it, and has not, through his neglect, or unless the debt has been lost through his unskilfulness.⁵ Nor is alleged negligence in collection of money proved by mere failure to account.⁶ In general, it is held, that no action can be maintained against an attorney for money collected by him until demand has been made. An attachment sued for after six years have elapsed from the inception of the claim will not be allowed. And it was refused in proceedings therefor, instituted against an attorney for money collected and not paid over by him, when six years had elapsed since the demand for such money.⁷ The distinctions are made, that, where the relation of attorney and client involves a *series* of acts and duties, an attorney is not suable, until the relation is dissolved. So where the relation involves only a single transaction, as the collection of a debt; he is not to be instantly annoyed with an action, nor suit brought until demand made. But if an attorney does not pay over, or give notice of money collected, in a reasonable time, it is culpable negligence, for which an action may be brought without demand.⁸ And if

¹ *Trumbull v. Nicholson*, 27 Ill. 149.

² *Hoby v. Buitt*, 3 B. & Ad. 350.

³ *Hastings v. Halleck*, 13 Cal. 203.

⁴ *Ibid.*

⁵ *Nisbet v. Lawson*, 1 Kelly, 275. See *Fleming v. Culbert*, 46 Penn. 498; *Ross v. Gerrish*, 8 Allen, 147.

⁶ *Bongher v. Schobey*, 23 Ind. 583.

⁷ *People v. Brotherson*, 36 Barb. 662.

See *Bongher v. Schobey*, 16 Ind. 151; *Black v. Hersch*, 18 Ind. 342.

⁸ *Glen v. Cuttle*, 2 Grant, 273.

an attorney undertakes to collect a debt, and by his gross negligence makes it of less value and embarrasses the collection of it,—as by taking a note and mortgage contrary to the direction of his client;—he is liable, although the debtor is still solvent.¹ (See p. 484.) And if he collects money under the direction and in the name of an agent, knowing that it belongs to the principal, and by order of the agent pays it in discharge of debts of the agent; this is not a discharge of the attorney from his liability to his principal.² (a)

§ 6. In regard to the *sufficiency of securities* taken by an attorney, or the *investigation of titles* to estates; where a solicitor had invested his client's money, on security which proved altogether insufficient, it was held that this was such gross negligence as almost to amount to fraud; and that the client could claim the amount, in a suit for the administration of the solicitor's estate, without establishing the client's right at law.³ So an attorney employed to record a mortgage, but who neglects to do so until after other subsequent incumbrances have been recorded, is liable immediately to the mortgagee for all the damages which are likely to be sustained by his default.⁴ So the plaintiff employed the defendant, an attorney, to sue A for a debt. A, to induce the plaintiff to forbear to sue, offered to give him a mortgage on some freehold property in which he had a reversionary interest. The plaintiff agreed to accept it, under the advice of the defendant, who was accordingly employed by him to act as his attorney in respect to the mortgage transaction, and to prepare the mortgage deed. The defendant stated to his clerk, that he must write to his town agents to make the necessary searches, to see whether A had taken the benefit of any of the insolvent acts. No such letter appeared to have been written, but he sent his clerk to inquire personally of A whether he had ever been insolvent. A denied that he had, and the mortgage was

¹ Wilson v. Coffin, 2 Cush. 316. See White v. Goffe, 24 Tex. 658.

² Nisbet v. Lawson, 1 Kelly, 275.

³ Smith v. Pocock, 23 Eng. L. & Eq. 470.

⁴ Miller v. Wilson, 24 Penn. 114.

(a) If an attorney realize a fund upon a judgment in his own favor out of his client's debtor, he is not bound to apply the fund to the satisfaction of his client's debt. Cox v. Sullivan, 7 Geo. 144.

Where a solicitor allowed shares belonging to a client to be forfeited by neglect, and afterwards replaced such shares, giving less than would have originally been paid; held, the client could only claim to be

placed in the same position as if the shares had never been forfeited. Smith v. Pocock, 23 Eng. L. & Eq. 470.

The damages, to which an attorney is liable for neglect, do not necessarily extend to the whole amount of the debt which he assumes to collect, but only to the loss which his client has actually sustained. Cox v. Sullivan, 7 Geo. 144.

executed, and the proposed action was dropped. A had in fact previously petitioned the insolvent court, and obtained an order for his protection. Held, this action, for neglect and unskilfulness, was maintainable, since the defendant, by his own language and conduct, showed that he had a suspicion on the subject, and felt that it was his duty to make a search, which he had not done.¹ So, in an action for negligence against an attorney, employed by a purchaser to inspect the title, it appeared, that, by indentures of lease and release, of the 9th and 10th of October, 1796, the estate had been conveyed to A, the father of the vendor's wife, and to B, to hold unto the said A and B, and their heirs and assigns, to the use and behoof of the said A and B, and the heirs and assigns of the said A forever, the estate of B being used only in trust for A, his heirs and assigns. A devised the estate to his daughter, and to the heirs of her body; but, in case she died, without leaving any issue of her body living at her decease, then to his nephew C and his heirs forever. The daughter, afterwards, by bargain and sale of the 11th of February, 1814, conveyed the estate to one D, to the intent that he might become tenant of the freehold, for the purpose of suffering a recovery, which was accordingly suffered. The daughter, afterwards, by deeds of lease and release of the 4th and 5th of March, 1814, executed upon her marriage, reciting that she was seised in fee-simple of the estate, conveyed the same to two trustees, in trust for her and her husband and their issue, and, in default of issue, to such person as she should appoint. The marriage was afterwards solemnized, and the daughter died without issue, and devised the estate in fee to her husband, who survived her. The husband, having contracted to sell the estate to the plaintiff, delivered to the defendant, as attorney to the vendee, an abstract of his title, containing the deeds of the 9th and 10th of October, 1796, but not certain indentures of lease and release of the 25th and 26th of February, 1814, whereby B conveyed the estate vested in him to the daughter of A in fee; but an abstract of these deeds was delivered by the vendor's solicitor to the defendant, four months before the conveyance of the estate was executed. The defendant laid before counsel a case, containing an abstract of the deed of the 11th of February, 1814, and of the recovery suffered in pursuance of it, of the deeds of the 4th

¹ *Cooper v. Stephenson*, 12 Eng. L. & Eq. 403.

and 5th of March, 1814, and of the will of the daughter of A, but omitting altogether the deeds of the 9th and 10th of October, 1796; and it further stated that A was seised in fee of the premises. The opinion of counsel was, that the vendor had a good title; but that opinion would not have been given, if the deeds of lease and release of the 9th and 10th of October, 1796, or those of the 25th and 26th of February, 1814, had been stated. The plaintiff, afterwards, being advised that his title was incomplete, paid a sum of money to C, the devisee in remainder, for a confirmation of his title. Held, first, that the recovery was invalid, because at that time the legal estate for life was in B, and she was only equitable tenant for life, with a legal remainder in tail, and, therefore, that the title was bad; and that a jury were warranted in finding the defendant guilty of negligence, so as to make him liable in this action.¹

§ 7. Whether negligence can be set up as a *defence to an action for an attorney's bill of fees*, is a point which has been much questioned. (a) If the services have proved entirely useless, it has long been agreed, that this may be shown in bar of the whole action; and, after some conflict of opinions, the weight of authority seems in favor of admitting any competent evidence of negligence, ignorance, or want of skill, as a defence to an action for professional services, as well as for any other work and labor.² It is said, in order to recover his bill of costs, the attorney is bound "to show affirmatively that he has done all that he ought to have done."³ Thus, the defendant having insured in London goods on

¹ Ireson v. Pearman, 3 B & C. 799.

² Per Lord Tenterden, Allison v. Rayner, 7 B. & C. 441.

³ 2 Greenl. Ev. § 143; Nixon v. Phelps, 3 Williams, 198; Judah v. Trustees, &c. 23 Ind. 272.

(a) See *Cristie v. Sawyer*, 44 N. H. 298; *Judah v. Trustees*, 16 Ind. 56. It is held that a declaration against an attorney for negligence must aver the payment of fees. *Cavillaud v. Yale*, 3 Cal. 108.

Upon a rule on an attorney to answer, the charge against him being, that he had received from a defendant an excessive sum for costs, upon a false statement that judgment had been signed and execution issued; it appearing that the attorney himself had no personal knowledge of the matter, the court discharged the rule, but ordered him to refund the overcharge and pay the costs of the application. *Eyre*, 1 C. B. (N. S.) 151.

See, as to the general requisites of such

declaration, *Wilson v. Coffin*, 2 Cush. 316. As to an amendment thereof, *Holman v. King*, 7 Met. 384.

An attorney who has voluntarily withdrawn from a suit is not entitled to withhold a paper in his hands, and prevent it from being used as evidence, until payment to him of the previous costs, that would be taxable for the plaintiff in case of his ultimate success. *White v. Harlow*, 5 Gray, 463.

The distinction has been made, that a jury may strike out from an attorney's bill an item wholly useless; but where it is partially useless, or he has been guilty of negligence, there must be a cross action. *Shaw v. Arden*, 9 Bing. 287.

a voyage to Calcutta, and the goods having been damaged on the voyage, the defendant instructed the plaintiff, an attorney, to take steps to obtain compensation from the underwriters. The plaintiff wrote letters to them, demanding payment; and, this being ineffectual, took out writs against them in the lord mayor's court, and, after issue joined, applied for a commission to examine witnesses in India, which that court had no power to grant, and the actions were accordingly discontinued. The plaintiff having sued the defendant for his costs; held, that the plaintiff, from the nature of the defendant's claim, must or ought to have known, that it would be necessary to take the evidence of witnesses in India, and was bound to have ascertained, before suing there, that the lord mayor's court could issue a commission, and, therefore, could not recover his costs; but that he might recover for the letters, as they might have produced payment.¹ So an attorney received from O and A, agents of C. L. & Co., of Paris, instructions to sue the acceptors upon five foreign bills of exchange, which they (O and A) alleged to be "unpaid and duly protested in their hands." A copy of one of the bills was sent to the attorney, with a note stating them to be all indorsed to C. L. & Co. The attorney thereupon brought the action in the names of O and A, and discovering afterwards, when the bills were for the first time shown to him, that there was no special indorsement to O and A, as required by the law of France, he discontinued, and brought another action in the names of C. L. & Co. Held, that the suing in the names of O and A, without having first ascertained that they were in a position to maintain an action on the bills, was such gross negligence, as to disable the attorney from recovering the costs of the abortive action.²

§ 7 a. But while an attorney should advise his client to the best of his judgment, and, if the client refuse to follow the advice, it is safer for the counsel to follow the client's instructions, so far as the rules of law will permit; yet, if the client sues the attorney for disregarding his instructions, he must show, presumptively, at least, that he was damaged thereby. And where a motion, which the client wished to have made, would probably not have been granted, and would have been likely to injure him; and it would have been highly injudicious to put in certain evidence, the omis-

¹ Cox v. Leach, 38 Eng. L. & Eq. 271; ² Long v. Orsi, 37 Eng. L. & Eq. 253.
1 C. B. (N. S.) 617.

sion of which was complained of: the attorney recovered his bill.¹ So counsel, who undertake to defend a client upon a criminal accusation, do not thereby agree to defend his bail upon a *scire facias* on the recognizance. And where the defendant did not appear at the first term, and died before the next; held, his representatives could not set up failure of consideration, as a defence to a note given to the attorney, for services to be rendered in defending the accused.² So, after the issuing of a writ in an action on a common money bond, the defendant wrote, stating that he had paid a part and could prove this, and that he was ready to pay the rest. The attorney for the claimant did not apply for an order of reference under the Common-Law Procedure Act, 1854, § 3, but delivered a declaration, to which the defendant pleaded payment. When the cause, after a considerable lapse of time, was in the paper for trial, a judge's order was obtained by consent to refer the matter to the master to take the account; and he made his *allocatur* in favor of the plaintiff for debt and costs. After the letter was written, and before the *allocatur* was made, the defendant became bankrupt. In an action brought by the attorney for the plaintiff against the plaintiff, on his bill, and in a cross action for negligence, the attorney admitted in evidence that the section did not occur to his mind on reading the letter, and that he could not say that the section ever came to his memory. Held, that there was no evidence of negligence on the part of the attorney in not applying for an order under the section; for that it would not have clearly appeared to any reasonable person, that the matter in dispute consisted either wholly or in part of matters of mere account, which could not conveniently be tried by a jury.³ So an attorney at law may consent, that a judgment obtained by the plaintiff, his client, upon the defendant's failure to answer, be vacated, and the defendant allowed to answer; on a state of facts on which the court, according to its customary practice, would make an order to that effect. Such a consent, and the failure of the defendant before judgment, are not alone sufficient evidence of negligence, to defeat an action brought by the attorney for his services in the suit. But if he consents without the knowledge of his client, he is responsible for any loss which may necessarily result, and which would have been avoided, if his client had been

¹ *Nave v. Baird*, 12 Ind. 318.

² *Headley v. Good*, 24 Tex. 232.

³ *Chapman v. Van Toll*, 8 Ell. & B. 396.

informed of the facts. It is not erroneous to reject evidence, that, at the time of vacating the default, the debtor had property, out of which the judgment could have been collected, when no evidence has been given of such negligence of the attorney in opening the default, as will affect his right to recover for his services, and when such fact, with the other evidence given or offered to prove negligence, is insufficient to establish it *prima facie*.¹

§ 8. In relation to the liability of an attorney to a party wrongfully sued; (a) an attorney, who maliciously and illegally sues out process, is thus liable.² And an attorney, directing the issue of an execution, and afterward refusing to state whether or not he had ordered its levy upon certain property, which was levied on, by order of his client, but taking the responsibility upon himself and inviting suit against himself by the owner, is estopped from denying in such suit his complicity and responsibility.³ So where a writ of *capias ad respondendum* has been set aside for irregularity, the attorney who sued it out is liable in trespass.⁴ So an action for false imprisonment lies against the plaintiff's attorney, who sues out a void *ca. sa.*, and delivers it himself to the officer, who, by his order, arrests the defendant thereon.⁵ So, in an action of trespass against the petitioner's attorney, for falsely and maliciously imprisoning the plaintiff; upon a plea of Not Guilty, the plaintiff proved that the defendant had indorsed his name and address on the warrant sued out for the petitioner, on which the plaintiff was committed. Held, sufficient evidence to support a verdict for the plaintiff on such plea. And the doctrine was laid down, that an attorney, who deliberately directs the execution of a warrant, is liable in trespass if it prove bad. And although, it seems, the act of the attorney, in handing over the warrant for execution, might be so divested of any further proof of concurrence on his part, that he would not be liable; he is liable, if his conduct

¹ *Clusman v. Merkel*, 3 Bosw. 402.

² *Warfield v. Campbell*, 35 Ala. 349.

³ *Ford v. Williams*, 24 N. Y. (10 Smith)

359.

⁴ *Codrington v. Lloyd*, 3 Nev. & Per.

442; 8 Ad. & Ell. 449.

⁵ *Barker v. Braham*, 2 W. Black. 866.

(a) Upon this subject it is said, by an eminent Judge: "The distinction is not between attorney and client, but between both of them and the officer whom they employed to execute his known duty in giving effect to the judgments and orders of competent courts. An attorney may be in the nature of an officer handing over

papers which may be afterwards acted upon, with no more concurrence than that of a postman who conveys a letter. When such is his conduct, this principle may protect him; but if he deliberately directs the execution of a bad warrant, he takes upon himself the chance of all consequences." Per Lord Denman, 5 Ad. & Ell. N. 114.

in or after the performance of such act shows a motive beyond the mere wish to discharge professional duty; as if, after the commitment, he has improperly delayed giving information as to costs, which was required by parties wishing to pay such costs and thereby purge the contempt.¹ So if an attorney, who has commenced a suit, knew that there was no cause of action, and dishonestly, and for some sinister view, ill purpose, or purpose of his own, which the law calls malicious, caused a party to be arrested and imprisoned; he will be liable therefor. So if he knows that his client is actuated by illegal or malicious motives. And it is not necessary to show a conspiracy between attorney and client. It is a sufficient averment, that he falsely and maliciously, without having any reasonable or probable cause for so doing, sued out the writ, and falsely and maliciously caused the party to be arrested under it.² So if an attorney, suspecting that his client is engaged in a systematic course of fraud and forgery, continues to act for him as if he were assisting to enforce just rights and give effect to genuine documents, he is guilty of gross misconduct, although not originally privy to the frauds, and although never informed of the manner in which the forged documents were obtained.³ So no privileges will protect an attorney from a suit for damages, where he has procured or advised a judicial officer to act beyond the scope of his jurisdiction. Thus an attorney advised a single justice to send to jail one who was brought before him on a charge of felony, whereas such power was delegated only to two justices. Held, such attorney was liable in damages; though not upon the mere fact, that he sues out the warrant, before any irregularity has been committed.⁴

§ 9. But an action on the case will not lie against an attorney at law, for acts done *bonâ fide* in the prosecution of his client's rights. It must be shown that they were malicious and without foundation.⁵ Thus an attorney, who merely issues an execution, and communicates to the sheriff the directions of his clients to seize thereon specified property, is not liable as a trespasser, though the seizure is wrongful. Nor although, pursuant to the authority and direction, and in the name of the plaintiff, he executes a bond of indemnity to the officer. Nor is such bond in-

¹ Green v. Elgie, 5 Ad. & Ell N. S. 99.

² Burnap v. Marsh, 13 Ill. 535.

³ Barber, *in re*, 6 Eng. L. & Eq. 338.

⁴ Revill v. Pettit, 3 Met. (Ky.) 314.

⁵ *Ibid.*

⁶ Wigg v. Simonton, 12 Rich. 583.

valid, for want of authority under seal to execute it; such an instrument binding the principal as his simple contract, it not being required by law to be under seal.¹ So an attorney is not liable, civilly, for ordering a levy on property, if he act in good faith and on reasonable cause, and probably correctly.² So A and B, attorneys, partners, delivered to a bailiff, for the purpose of being executed, a precept, issued from a local court, indorsed with the attorneys' names, and directing a levy upon goods within the jurisdiction. The attorneys carried on business at Falmouth; and the party to be levied upon had had for many years a house and goods at Penryn, and was not known to have a residence or property elsewhere. The levy was made in that house. The attorneys had sent a message to the debtor, as to the time at which the bailiff would levy; and the bailiff, while levying, said that he was employed by those attorneys. In an action against them and the bailiff for unlawfully levying, the attorneys pleaded, 1. Not Guilty. 2. A justification under the process. The bailiff pleaded the justification only. The plaintiff replied, that the house was not within the jurisdiction; and issues were joined thereon. Held, 1. That the attorneys were not entitled to an acquittal at the close of the plaintiff's case, in which the facts had appeared as above stated. 2. That on the close of the whole case, nothing material having been added, except that the defendants, though they proved a regular judgment, failed to bring themselves within the jurisdiction, the Judge ought to have told the jury, that there was no evidence to implicate the attorneys. And this, even assuming them to have known that the bailiff intended levying at the house in question; although, if they had known also that the house was beyond the jurisdiction, they might possibly have been considered joint trespassers with the bailiff.³ (a)

¹ Ford v. Williams, 3 Kern. 577.

² Hunt v. Printup, 28 Geo. 297.

³ Sowell v. Champion, 6 Ad. & Ell. 407. See Oakley v. Davis, 16 E. 82.

(a) To an action against an attorney for ordering an arrest upon an execution, it is a good defence, that the plaintiff has recovered judgment upon a written agreement to discharge the judgment and execution. *Smith v. Way*, (Mass.) Law Reg. Dec. 1865, p. 126.

Cases have arisen, between attorneys and other persons, not parties, connected with the actions in which such attorneys were employed. Thus A, a defendant's attorney, requested B, the plaintiff's attorney, to forbear charging the defendant in execu-

tion until next term; falsely represented to B that he had the authority of the defendant to consent thereto; and gave a consent in writing to that effect, which omitted to state that the proceedings were stayed at the request of the defendant, according to the rule. B forbore to charge the defendant in execution until the next term, and the defendant was discharged for the above reason. Held, no action was maintainable by B against A. *Hewitt v. Melton*, 1 Crompt. M. & R. 232.

A sheriff declared in case, for that, the

defendants being attorneys of P, who had sued out a *ca. sa.* against John Wright, and the sheriff having in custody (under another *ca. sa.*) another John Wright, who was entitled to his discharge, the defendants, well knowing the premises, falsely represented to the sheriff that the last-mentioned J. W. was the J. W. against whom P's writ had issued; by means whereof the defendants caused the sheriff to detain the J. W. who was in his custody; for which the last-mentioned J. W. sued the sheriff, and he paid money by way of compromise. The attorneys pleading Not Guilty, evidence was given, for the sheriff, that his officer delivered a note to the defendant's managing clerk in P's action, describing the John Wright who was in custody, and inquired if that was the John Wright whom they had sued on the behalf of P; and that the clerk took the letter into the office where the defendants were, and afterwards returned and told the officer that that was the John Wright; neither the defendants nor the clerk at that time knowing the contrary. Held, by the Court of Queen's Bench, that, on this evidence, the jury were warranted in finding for the sheriff; an action being maintainable for the misrepresentation, and the defendants being liable, under the circumstances, for the misstatement of their clerk. Also, that the action lay, though the detainer was made, and the money for compromise paid, by the sheriff's officer, and not by himself.

But, held by the Court of Exchequer Chamber, that a plea, alleging that the defendants had good and probable reason to believe, and did with good faith believe the representation to be true, was an answer to the action. The Court of Queen's Bench having given judgment for the plaintiff *non obstante veredicto* on this plea, judgment reversed. *Evans v. Collins*, 5 Ad. & Ell. N. S. 804.

In an action by a sheriff against an attorney at law, for false representations that he was authorized to execute a written contract of indemnity, in the name of the plaintiffs in various writs committed by him to the sheriff for service, and thereby inducing him to accept the same, and attach and sell property; "to justify a verdict for the plaintiff, the jury must be satisfied that the defendant had no right, either from previous appointment or subsequent ratification, to sign the contract as attorney; that he falsely pretended that he had such authority, knowing that he had not, or having no reason to suppose that he had; and that the plaintiff, upon the faith of that representation, proceeded to perform official acts and thereby to incur liabilities,

and, by so acting, and being so misled, had sustained loss and damage." *Jones v. Wolcott*, 2 Allen, 247.

A case of great interest and importance (*Swinfen v. Lord Chelmsford*), (a) relating to the subject of the foregoing chapter, has recently occurred in the English Court of Exchequer. Although predicated in part upon a distinction between *barrister* and *attorney*, not generally recognized in the United States (see 2 Sharswood's Black. 165); it embodies a general view of the law and an abstract of previous decisions, which entitle it to be cited at length. We subjoin the opinion of Pollock, C. B., which sufficiently sets forth the facts and the pleadings of the case.

For the report we are indebted to the "Law Reporter" for August, 1860, page 232:—

"Pollock, C. B., delivered judgment. The first count set out the devise to the plaintiff of certain real estate by Samuel Swinfen, the filing of a bill in chancery by the heir-at-law, and the direction of an issue *devisavit vel non* by the M. R.; that the issue came on to be tried, and that the defendant, being a barrister-at-law, was retained and employed by the plaintiff to act as her leading counsel on the trial of the said issue, to maintain and support the affirmative thereof, and to conduct the case of the plaintiff on the said trial; that the defendant accepted the retainer, and undertook to the plaintiff to perform his duty to her as such leading counsel in the conduct and management of her case at the trial of the said issue, pursuant to his instructions. That the defendant, after the trial had begun and during the progress thereof, well knowing that he had no authority from the plaintiff to enter into any terms of compromise on her behalf, without the authority and against the will of the plaintiff, and contrary to her instructions, wrongfully and fraudulently, and in neglect and violation of his duty to the plaintiff, entered into what purported to be an arrangement or agreement with Frederick H. Swinfen (the defendant in the issue), through his counsel, to compromise the said cause and the right and claim of the plaintiff under the will, and arranged and concluded certain terms of compromise in that behalf, which were signed by the counsel on each side. The declaration then set out the terms of the compromise, the first of which was that a juror should be withdrawn; secondly, that the plaintiff should give up her claim to the estate, and receive an annuity instead. That the defendant wrongfully and fraudulently consented to a juror being withdrawn, and

(a) 2 Law Times Reports, (N. S.) 406; 5 Hurl. & Nor. 890.

that a juror was withdrawn accordingly, and the defendant failed to perform his duty as leading counsel for the plaintiff, the issue was not tried, and no verdict was given. The declaration then sets forth the special damage resulting to the plaintiff from the compromise; that she lost the opportunity of then trying the issue and obtaining the verdict of the jury; that an order of *Nisi Prius* was drawn up, which was made a rule of the court of C. P., on which proceedings were taken to procure an attachment against the plaintiff for disobedience of the said rule, and she was put to expense in resisting these proceedings. That the defendant in the issue filed a supplemental bill to enforce performance of the compromise, whereby she was put to expense and was kept out of possession of the estate. The defendant pleaded, first, 'not guilty;' and, secondly, that he did not know that he was not authorized to compromise the suit, but, on the contrary, thought that he was authorized; and for a seventh plea to the first count the defendant said that he was retained and instructed as leading counsel merely by the delivery of a retainer to him, and of a brief in the cause delivered in the ordinary way by the attorney of the plaintiff, and without any restriction on the exercise of the discretion to do what he might think best for the interest of his client at the trial, ordinarily exercised by and allowed to a barrister retained by a suitor to hold a brief for him at the trial of an issue or issues of facts by a jury; and that after he was so retained and instructed, and before he did what is complained of, and while the trial was pending, one Charles Simpson, the plaintiff's attorney, informed the defendant of certain circumstances which would be material on the trial, and which the attorney stated made it desirable that the case should be arranged. And the defendant further said that the circumstances then were, in his judgment as counsel, material and important to the issue, and, with the other circumstances of the case, made it expedient and advisable for the interests of the plaintiff that the trial should not be proceeded with, and that an arrangement or agreement should be entered into on her behalf with the defendant for the purpose of compromising the plaintiff's claim. And the defendant says that on account of these matters, and under the circumstances, he consented to the withdrawal of a juror upon the terms stated in the first count as being, in his fair and honest judgment and belief, the best and most prudent and expedient thing to be done for the plaintiff, and the best for her interest, and that he did it without fraud or negligence, and in good faith, and in the exercise of the best of his judgment,

and in the honest exercise of his discretion as her counsel. By the last plea the defendant denied that he was retained in manner and form as in the declaration mentioned. In summing up the case, I told the jury that in my opinion the law required of a barrister no more than an honest discharge of his duty to the best of his judgment and ability; and though the defendant might have been utterly wrong, and altogether mistaken, or might (as suggested by the counsel for the plaintiff) have been misled by the influence of fear, yet that if his intentions were honest, and he *bonâ fide* meant what he did for the benefit of his client, he was not responsible to that client in damages for anything that he had done; that an advocate was not bound to do more than to give his best advice, his best consideration, and to conduct the case while in his hands in such a manner as he honestly thought would be for the benefit of his client. I read the second plea to the jury distinctly, and asked them for their verdict on the issue arising on that plea. I further directed the jury, with reference to the seventh plea, the substance of which I stated to them in the terms of the plea, that if it appeared to the defendant, according to the best of his judgment, that what he was doing was for the interest of his client, and taking that view of the case, he honestly did what he did (which was a question of fact for them, the jury, to determine), then, in my opinion, he was not liable in that action, and their verdict ought to be for defendant. We are all of opinion that the rule for a new trial ought to be discharged. This case is of very great and general importance, raising questions as to the duties and responsibilities of the members of the bar, and the obligation under which they come by accepting a retainer and afterwards holding a brief, or (as is more frequently the case) by taking a brief without a retainer. They have no legal claim to any remuneration for the services they render, though they usually receive a fee or *honorarium*, and they undoubtedly, as a matter of fact (in the ordinary course of business), enter into no express contract. The authorities on the subject are very few; on this particular case there is no direct authority at all, — that is, there is no instance of the decision of a court upon a similar question between the client and the advocate; the indirect authorities are chiefly *obiter dicta* of judges in the course of giving judgments in other cases, and they chiefly relate to the analogous profession of a physician. There are, no doubt, *dicta* in Rolle's Abridgment, which would seem to imply that a man of the law, as he is called, might be responsible for not performing his duty; but when the year-books are

referred to, it seems very uncertain whether these *dicta* proceed from the bench or from the bar; and, if from the bench, they are not given as a judgment in the case before the court, but merely as an illustration of the argument or point under discussion. More recently expressions occur which appear to have the same tendency, such as leaving the suitor to his remedy against the counsel, an expression on which much stress was laid in the argument. This occurs with respect to the case of Sir George Downing. The case is reported in the *Equity Cases*, Ab. p. 165, but the remark referred to was made by Lord Chancellor Talbot in *Bradish v. Gee*, Kenyon, 176, when the case of Sir George Downing was cited. But in all the modern cases where any question has arisen between the barrister and the client, it has been decided in favor of the barrister, and it may be very safely asserted that there is no instance of any action being successfully brought against a barrister for neglect of duty; and, on the other hand there are instances where such an action has been successfully resisted. Upon an express agreement the barrister would, no doubt, be liable as any other person or party to a contract; so if he intentionally did a wrong, and acted with malice, fraud, or treachery, we think he would be responsible, like every other wrong-doer, for the mischief thereby occasioned, notwithstanding his position as a barrister. The case of *Fell v. Brown*, 1 Peake, N. P. Cas. 96, was an action against a barrister for unskillfully and negligently settling and signing a bill in equity, which was referred to the master, and the plaintiff was obliged to pay the costs of the reference. It was contended that the negligence was very gross. Lord Kenyon nonsuited the plaintiff on the opening, stating his clear opinion that the action could not be supported. He said it was the first action of the kind, and he hoped it would be the last. The opinion of Lord Kenyon was never questioned, although he invited an appeal to the court, stating that he took a note for that purpose. Some months afterwards another case (*Turner v. Phillips*, ib. 166) came before Lord Kenyon. It was an action to recover back the fee paid to a barrister to attend the trial of a cause, he not having attended. The parties agreed to settle the matter out of court, but Lord Kenyon expressed a clear opinion that the action would not lie, and referred to the case of *Chorley v. Bolcot*, then recently decided, 4 T. R. 317, in which it seemed to be taken for granted that a barrister would not be liable. We have delayed giving judgment in the hope of being unanimous upon the broad and general questions that arise in the case; but, although we are unanimous

as to the mode in which this rule should be disposed of, we have not been able to agree as to all the points that belong to the general question; and, perhaps, as we are not sitting in a court of the last resort, it is the less necessary that we should go into the whole question and discuss and decide all the points that belong to it. We are all of opinion that an advocate at the English bar accepting a brief in the usual way undertakes a duty, but does not enter into any contract or promise, express or implied. Cases may indeed occur where, on an express promise (if he made one), he would be liable in *assumpsit*; but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client but the court in which the duty is to be performed and the public at large have an interest. We proceed, therefore, to give the reasons of our judgment, assuming (as the jury have found) that everything done by the defendant was done in honesty and good faith. The complaint on the first count is twofold: first, it is said the defendant consented to a juror being withdrawn, and so prevented the cause from being tried; secondly, it is alleged that the defendant agreed that the estate in dispute, to which she was asserting her title under the will, should be given up, and conveyed to the heir-at-law. Now, as to the first of these allegations, we are all of opinion that no action lies, taking along with the other facts the verdict of the jury. The conduct and control of the cause are necessarily left to counsel. If a party desires to retain the power of directing counsel how the suit shall be conducted, he must agree with some counsel willing so to bind himself. A counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question, or for honestly taking a view of the case which may ultimately turn out to be quite erroneous. If he were so liable, counsel would perform their duties under peril of an action by every disappointed and angry client. We think, therefore, that no action lies against the defendant for consenting to withdraw a juror, even though contrary to the client's instructions, provided it be done *bonâ fide*, as the jury have found it was done. The other complaint made in the first count is, that the defendant agreed on the plaintiff's behalf that the estate should be given up, and a conveyance of it executed by the plaintiff. As to this, the plaintiff has always contended that the defendant had no authority or power to make such an agreement; that it was not binding, and that the agreement was a nullity; and we are of opinion that,

although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial, we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, we think in an action for a nuisance between the owners of adjoining land, however desirable it may be that litigation should cease by one of the parties purchasing the property of the other, we think the counsel have no authority to agree to such a sale so as to bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void. With respect to the case before us, we consider this was the decision of the M. R. and of the Lords Justices on appeal, and was the opinion of the late Crowder, J., when the case was before the C. B. If the act of compromise was a nullity, the rights of the plaintiff remain the same, and she is so far as they were concerned, altogether uninjured. But then it is said that she has been put to expenses and incurred costs in resisting attempts to enforce the agreement of compromise in the C. P. and in Chancery; but it is a general rule of law that, to subject a person to law proceedings without malice gives no cause of action. The courts of equity awarded such costs as the law allows, and we think she cannot in this action recover more. (See *Doe v. Filliter*, 13 Mee. & W. 47, and the authorities there cited; and *Coterell v. Jones*, 11 C. B. 713.)

The Court of C. B. thought fit not to give her costs, and we think it must be taken that she was not entitled to them, and cannot claim them in this action. See *Malden v. Fyson*, 11 Q. B. 292, and especially that part of the judgment in page 301. We think the law is as we have stated, and there are other instances in the law which illustrate this. No action lies for a prosecution; however groundless, which has occasioned costs, unless the prosecution was also malicious; nor will any action lie for extra costs, however unfounded a suit may be, and even though it was brought vexatiously. On these grounds, then, no action will lie against counsel for any act honestly done in the conduct or management of the cause, including the withdrawing a juror, and the residue of the complaint is that the defendant did a void act, and exposed the plaintiff to legal proceedings, for which, if done *bonâ fide*, no action lies against any one. The words 'wrongful' and 'fraudulent' in the declaration ought to have been proved, and therefore the direction was right. We have assumed, for the purpose of giving judgment, that no authority in fact was given to the defendant to make any compromise, and even that contrary instructions may have been given, and that the defendant was aware of this. It is not, however, to be understood that we have formed, or that we express, any opinion either way. If the defendant, under the circumstances we have assumed, be not liable in this action (as we think he is not), he would *à fortiori* not be answerable if he had authority, or had reasonable ground for believing that he had, and was not acting contrary to express or implied instructions."

CHAPTER XLII.

TORTS CONNECTED WITH THE RELATION OF HUSBAND AND WIFE.

1. Action by the husband alone.
2. By husband and wife.
3. By the wife alone.
6. Against husband and wife.

15. Mutual personal rights of husband and wife.
17. Action for criminal conversation or seduction, and for enticing away or harboring a wife.

§ 1. A HUSBAND may in many cases maintain an action alone for an injury to his wife. (a)

§ 2. A declaration in *trespass*, for entering the plaintiff's house, taking his goods, and falsely imprisoning his wife, is good after verdict; and the injury to the wife shall be taken as matter of aggravation only.¹ So where an action is brought merely for damage to the real estate of the wife, during coverture, the husband may sue alone, or the wife may be joined in the suit.² So under a conveyance of lands to husband and wife in fee, they hold not in moieties but in entireties. And the husband may maintain in his own name an action of trespass *qu. claus.* for cutting down and carrying away timber.³ When the injury is such that the husband receives a separate loss or damage, as if in consequence of battery he has been deprived of her society, or been put to expense, he may bring a separate action in his own name.⁴ So, a husband having by law a right to the services of his wife, whether he requires them or not, and being bound to sustain her, in sickness and in health, anything that diminishes the value of the right, or increases the burden of the duty, necessarily occasions a pecuniary loss to the husband. Hence he may maintain an action

¹ *Heminway v. Saxton*, 3 Mass. 222.

² *Tallmadge v. Grannis*, 20 Conn. 296.

³ *Fairchild v. Chastelleux*, 1 Barr, 176.

⁴ *M'Kinney v. Western, &c.* 4 Iowa. 420.

(a) See *Adams v. Barry*, 10 Gray, 361. It is the general rule, applicable alike to the relations of husband and wife and parent and child, that two actions may often be brought for one injury; one for the per-

sonal damages to the party injured; the other for *loss of service*, technically so called, or other mere pecuniary loss. See *Rogers v. Smith*, 17 Ind. 323.

for slanderous words spoken of the wife, affecting her health and spirits, without proving that her services were of any value, or that he has paid out anything for medicine and attendance.¹ (a) So a husband may maintain replevin for personal chattels belonging to his wife at the time of the coverture, without joining her in the suit.² (b) Or an action for malicious prosecution of the wife.³ But a husband, whose wife has been injured by reason of a defect in a highway, cannot maintain an action against the town, to recover for medical and other expenses incurred, or for loss of his wife's services, in consequence of such injury.⁴ So, where the husband distrains and avows for rent arising from the land of the wife, without joining her in the proceedings, he must show affirmatively that the rent accrued after the marriage; for this cannot be intended, and, if it be not shown, the objection may be taken at the trial.⁵ (c)

§ 8. And in many cases the action for injury to the wife should be brought by the husband and wife jointly. Thus husband and wife should join in replevin for property of the wife.⁶ So, for an injury to the person of the wife during coverture, by battery, or to her character, by slander, or for any such injury, the wife must join with the husband in the suit.⁷ Thus an action of trespass may be maintained by husband and wife, against a party who drove a chaise against another chaise, in which the wife was then riding, whereby she was thrown out, and sustained an injury.⁸ So, in an action against a town, for injury done to the wife through defect in a highway, the wife must be joined.⁹ And in such ac-

¹ *Olmstead v. Brown*, 12 Barb. 657.

² *Brown v. Fitz*, 13 N. H. 283.

³ *Smith v. Hickson*, Rep. t. Hardw. 49.

⁴ *Harwood v. Lowell*, 4 Cush. 310.

⁵ *Decker v. Livingston*, 15 Johns. 479.

⁶ *Brown v. Fifield*, 4 Mich. 322.

⁷ *M'Kinney v. Western, &c.* 4 Iowa, 420; *Johnson v. Dicken*, 25 Mis. 580.

⁸ *Hopper v. Reeve*, 1 Moore, 407.

⁹ *Starbird v. Frankfort*, 35 Maine, 89.

(a) Though not unless the persons, to whom the words were spoken, were justified by some peculiar circumstances in repeating them to the wife. The author of the slander cannot be held accountable for its unlawful repetition. 12 Barb. 657.

(b) In Massachusetts, suit must be brought by the husband alone, for conversion of chattels bought by the wife with her own earnings. *Gerry v. Gerry*, 11 Gray, 381.

(c) Independently of statute, a wife cannot maintain an action for the killing of her husband. *Wyatt v. Williams*, 43 N. H. 102; *Lyons v. Woodward*, 49 Maine, 29.

In New York, a married woman cannot maintain an action, in her own name alone, to recover damages for slanderous words spoken of her. *Klein v. Hentz*, 2 Duer, 633.

But a complaint, stating that the defendant, as a common carrier, undertook to carry the plaintiff, a married woman, and her baggage, which was her separate property, from San Francisco to New York, and a loss of the property while in the custody of the defendant, is good in substance under the code. *Spies v. Accessory, &c.* 5 Duer, 662.

tion for *bodily injury* suffered by the wife, the damages may include loss of labor and the expense of a cure.¹ (a) So a suit to recover damages for personal property of the wife, sold under execution as the property of the husband, should be brought in the name of the husband and wife to the use of the wife.² So the wife is a proper party with her husband, in an action for trespass to the land of the wife before marriage.³ But an action of trespass, for cutting trees on land held by husband and wife in right of the wife, may be brought by the husband alone, or by the husband and wife jointly, at his election.⁴ So husband and wife may join, in an action of the case for obstruction of a way, appurtenant to the wife's land, in their occupation or possession.⁵ So a husband and wife brought an action for injury to a right, belonging to her and appurtenant to her land, to take water from a reservoir of the defendant. The declaration stated, that the wife owned the land; that the plaintiffs owned and possessed the right to take the water, as owners and possessors of the land; and that by the wrongful act of the defendant the plaintiffs had been deprived of the use of the water. A verdict having been rendered for the plaintiffs, on a motion in error from the judgment for insufficiency of the declaration; held, that enough was alleged to show a right of action in the wife; that she was properly joined with her husband; and the declaration might be construed as alleging only an injury to her right, enjoyed by them both during the coverture. But if

¹ *Sanford v. Augusta*, 32 Ib. 536.

² *Keeney v. Good*, 21 Penn. 349.

³ *Hair v. Melvin*, 2 Jones, 59.

⁴ *Allen v. Kingsbury*, 16 Pick. 235.

⁵ *Cushing v. Adams*, 18 Pick. 110.

(a) A *promise*, founded on a consideration, relating to the wife's personal security, does not vest absolutely in the husband, but may be the subject of an action in the name of husband and wife. Thus the plaintiffs, husband and wife, on the trial of an action for a personal injury to the wife, may prove, that she gave money to him to buy a ticket for her passage in the cars to A; that such a ticket was accordingly procured for and received by her; and that she thereupon took her seat in the cars, to be conveyed to A.

Where the declaration, by husband and wife, for a personal injury to the wife, after stating the nature and extent of the injury, proceeded to allege, that, by means of such injury, she became sick, and was prevented from attending to her necessary affairs, and that the plaintiffs were thereby forced to,

and did, necessarily expend two hundred dollars in endeavoring to effect a cure; held, although the plaintiffs could not recover, in the same action, for the wife's personal injury, and also for the expenses of her cure, yet, in this case, the ground of damages was the wife's personal injury alone, and the statement regarding the expenses of her cure was descriptive of the extent of her injury, and not a distinct and substantive ground of damages, and in that aspect, though unnecessary, was very proper; but if otherwise, yet, as the gist of the action was the breach of contract in not carrying the wife safely, and this was a ground on which the plaintiffs could recover, it would be presumed, after verdict, that the court confined the evidence to that ground. *Fuller v. Naugatuck, &c.* 21 Conn. 557.

to be regarded as also alleging an injury to his right as distinct from hers, and as founded on a separate interest, then it would be intended that the judge on the trial allowed no evidence except as to injury to her right, and the allegations not pertinent thereto would be regarded as surplusage.¹ (a)

§ 4. But, in many cases, husband and wife cannot join in actions for injury to the wife. Thus no action can be sustained by a husband and wife jointly, for the conversion of property which they claim under a mortgage executed to her alone, to secure money lent by her, a portion of which was furnished to her by him.² So, in case by husband and wife against the defendant, for driving his horse and chaise against the plaintiff's chaise, by which the wife was thrown out, &c.; it was alleged, that the husband had lost the labor and comfort of his wife, and had been put to great expense in her cure, &c. After verdict for the plaintiff, judgment was arrested, because injuries were charged in the action, for which husband and wife could not join.³ Nor can husband and wife maintain a joint action of trespass *qu. claus.*, unless it appears that the wife had some interest in the close.⁴ Nor for an injury to her personal property after the marriage. Such action is bad, on demurrer, motion in arrest, or writ of error.⁵ So husband and wife cannot join as plaintiffs in replevin or detinue, unless where the property is held by the wife in some special character or right. And where a husband attempted to convey property to his wife and a third person as trustees, such conveyance being as to the wife void; it was held that a declaration, joining the wife, a subsequent husband, and the trustee, could not be maintained.⁶ And while the marriage is in full force, the wife should not be joined with her husband, although she lives separate from him, and the action is for an injury to property acquired by her labor or by gift to her.⁷ So a husband and wife cannot jointly sue for a joint slander or libel upon both. The husband should sue alone for the injury to him, and the husband and wife should

¹ Taylor v. Knapp, 25 Conn. 510.

² Hennessey v. White, 2 Allen, 48.

³ Barnes v. Hurl, 11 Mass. 59.

⁴ Meader v. Stone, 7 Met. 147.

⁵ Rawlins v. Rounds, 1 Williams, 17.
See Owen v. Tankersley, 12 Tex. 405.

⁶ Van Arsdale v. Dixon, Hill & Denio, 358; Walker v. Fenner, 28 Ala. 367.

⁷ Moores v. Carter, 1 Hemp. 64.

(a) Where husband and wife join in an action for an assault on the wife, no words or acts of the husband can be proved in mitigation of damages, unless the wife was privy to them. Everts v. Everts, 3 Mich. 590.

join for the injury to her.¹ And the general distinction is, that, when words spoken of the wife are only actionable on proof of special damage, the husband must sue alone; but where they are actionable *per se*, she may unite with her husband in bringing the suit.²

§ 5. In cases of trust for the benefit of married women, they may sometimes bring actions in their own names. Thus where a statute provides that any married woman, possessing property by virtue of that act, may release to the husband the right of control of such property, and he may receive and dispose of the income thereof, so long as the same shall be appropriated for the mutual benefit of the parties; an action for an injury to the property of the wife, though the control of it may have been released to the husband, must be brought in the wife's name.³ So a bequest to a widow, for her own proper use during her life-time, remainder over, gives her a separate use, and the executors of her after-taken husband, having converted the property, are liable to her in trover.⁴

§ 5 a. In a suit for an injury to a married woman, by malpractice, a discharge of the cause of action, given by the husband to the defendant, is a bar to the suit, notwithstanding the previous desertion of the wife by the husband.⁵

§ 6. The wife may sometimes properly be joined as defendant. Thus, in an action for the poisoning of the plaintiff's geese by the defendant's wife, husband and wife should be joined as co-defendants, although it was the sole act of the wife.⁶ But it is held, that, if a chattel be in the possession of the husband, or in the family, along with husband and wife, a refusal by the wife to deliver it on demand is not a *conversion* by her. And a declaration in trover against husband and wife, alleging the conversion to have been, not by the husband alone, but by the defendants to their use, was held bad, on motion in arrest of judgment.⁷ But where a bailiff seized the goods of the plaintiff, under a *fi. fa.* against a third person, and deposited them in an out-building of

¹ *Gazynski v. Colburn*, 11 Cush. 10; *Hart v. Crow*, 7 Blackf. 351.

² *Williams v. Holdredge*, 22 Barb. 396.

³ *Collen v. Kelsey*, 39 Maine, 298.

⁴ *Snyder v. Snyder*, 10 Barr, 423. See *Daniel v. Daniel*, 6 B. Mon. 230; *Huntly v. Ratliff*, 5 Ired. 542.

⁵ *Ballard v. Russell*, 33 Maine, 196.

⁶ *Matthews v. Fiestel*, 2 E. D. Smith, 90; See *Clement v. Wafer*, 12 La. Ann. 599; *Goulding v. Davidson* (N. Y.) Law Reg. Nov. 1863, p. 34; *The Liverpool, &c. v. Fairhurst*, 9 Exch. 422.

⁷ *Rowell v. Keefe*, 6 Rich. 521. *Contra*, *Keyworth v. Hill* 3 B. & Ald. 685.

an inn, with the assent of the innkeeper, whose wife assisted him in the management of his business; and, on a demand upon her to deliver up the goods, she said she had seen the attorney of the plaintiff in the original suit, that he had told her not to bother herself about them, he would see her harmless; and that she would not give them up: held, in an action of trover against the innkeeper and his wife, in which was alleged a conversion by her to her husband's use, that this refusal was evidence of a conversion by her.¹ While, on the other hand, an action for stolen goods sold to the defendant's wife, does not lie against him without a demand, for he comes into constructive possession without fault on his part.²

§ 6 a. The plaintiff delivered a watch to A, under a conditional bargain, that, if he kept it, he should pay an agreed price; or, if he returned it, a specific rent. A died, the price not having been paid, and his wife, with knowledge of the contract, administered upon his estate, and embraced the watch in her inventory. The estate being settled as insolvent, she received the watch, under a decree of the probate court, as part of her allowance, and subsequently sold it as her own private property. Held, the plaintiff had not lost his property in the watch; that the sale by the wife was a wrongful conversion; and that the plaintiff might maintain trover. The wife having again married, prior to the sale, the action was properly brought against the husband and wife jointly.³

§ 7. It is held, that, where husband and wife commit a joint *assault*, he should be sued alone.⁴ But the prevailing rule is, that a joint action of trespass may be maintained against husband and wife, for a joint assault and battery by them; and there may be a verdict and judgment against one, and in favor of the other.⁵ And in an action against husband and wife for an assault and battery, where the evidence shows that the wife was the principal and only offender, it is clearly a case to be submitted to the jury. The presumption of coercion, which the law raises where the acts are done by the wife in the presence of the husband, is only *prima facie*, and, like other presumptions, may be repelled. And such action is joint and several in its nature, and it is entirely compe-

¹ *Catteral v. Kenyon*, 2 Gale & Dav. 545; 3 Ad. & Ell. N. S. 310.

² *Gurney v. Kenny*, 2 E. D. Smith, 132.

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³ *Jillson v. Wilbur*, 41 N. H. 106

⁴ *Sisco v. Cheeney*, Wright, 9.

⁵ *Roadcap v. Sipe*, 6 Gratt. 213.

tent to convict the husband and acquit the wife, if she is exempt from liability by reason of the coercion of her husband, or for any other cause. And if the wife is exempt from liability, it is no ground for nonsuiting the plaintiff.¹

§ 8. Where an action is brought against husband and wife jointly, for a tort of the wife committed during coverture, she must be served with process; but if she appears and pleads to the merits, she waives her right to except to the want of service, and will be bound by a judgment against her.²

§ 9. Where an action is brought against husband and wife for a *libel* by the wife, no smaller damages are to be assessed than if the libel had been published by her while sole, and the action had been against her alone.³

§ 10. In a suit against the husband for cutting and carrying away timber, the wife has no right to be admitted a party, on the ground that she claims the land.⁴

§ 11. Although a married woman is responsible for torts, and consequently for frauds, committed by her during coverture, yet the liability is restricted to torts *simpliciter*. It is otherwise when the fraud is directly connected with a contract by her, and is the means of effecting it, and parcel of the same transaction. Therefore, where a married woman, by a false and fraudulent representation that she was sole, induced a party to advance money to another, on the security of a promissory note signed by her, it was held, that no action lay against the husband and wife.⁵ Nor for false representation that she was a widow, at the time of executing certain securities.⁶

§ 12. A wife cannot be made liable, in an action on the case, for the fraud of her husband, committed upon the exchange of a farm, belonging to her, for another, either on the ground of principal and agent, or of partnership.⁷

§ 13. The husband of an administratrix is liable for the *devastavit* of the wife, whether committed before or during the coverture, if his liability be fixed before the death of the wife.⁸ But where the husband has not by his own acts made himself responsible, he is only liable for a *devastavit* of his wife committed as

¹ Wagener v. Bill, 19 Barb. 321.

² Smith v. Taylor, 11 Geo. 20.

³ Austin v. Wilson, 4 Cush. 273.

⁴ Leach v. Millard, 9 Tex. 551.

⁵ Fairhurst v. Liverpool, &c. 26 Eng. L.

& Eq. 393; 48 Penn. 497. See Schaeffer v. Fithian, 17 Ind. 463.

⁶ Keen v. Hartman, 48 Penn. 497.

⁷ Birdseye v. Flint, 3 Barb. 500.

⁸ Bobe v. Frowner, 19 Ala. 89.

administratrix before marriage, whilst the marriage subsists between them; so that his or his wife's death, before final judgment or decree, discharges his liability.¹

§ 14. A husband is not liable as *executor de son tort*, for acts of the wife, done without his knowledge: otherwise, where he acts or advises her.²

§ 15. In reference to the mutual rights of husband and wife; where a wife is voluntarily and without any restraint absent from her husband, a court of common law has no jurisdiction, upon his application, to issue a writ of *habeas corpus*, to bring up her body.³

§ 16. It is held, that a husband has no right to inflict corporal punishment on his wife; but may defend himself against her, and restrain her from acts of violence towards himself or others.⁴ (a)

§ 17. An action lies in favor of the husband for *criminal conversation* with, or *seduction* of, his wife. And the remedy may be trespass or case.⁵ The latter is now the more usual form of action.⁶ In an old case it is laid down, that, if adultery be committed without any force, but by the wife's consent, yet the husband may bring an action on the case, wherefore the defendant ravished his wife, without laying it *per quod consortium amisit*.⁷ And in relation to the alternative remedies of trespass and case, it is said:⁸ "Though it is now usual and proper to declare in trespass *vi et armis* and *contra pacem* for criminal conversation, and for debauching daughters and servants; yet, as the consequent loss of society or service is the ground of action, the plaintiff is still at liberty to declare in case. When, however, the action is for an injury really committed with force, as by menacing, beating, or imprisoning wives, daughters, and servants, it is most proper to declare in trespass." Trespass "lies for criminal conversation, seducing away a wife or servant, or for debauching the latter;

¹ Maffit v. Commonwealth, 5 Barr, 359.

² Hinds v. Jones, 48 Maine, 348.

³ Sandilands, 12 Eng. L. & Eq. 463.

⁴ People v. Winters, 2 Parker, 10.

⁵ James v. Biddington, 6 C. & P. 589;

Van Vacter v. McKillip, 7 Blackf. 578;
Chamberlain v. Hazelwood, 7 Dow. P. C.

816; Parker v. Elliott, 6 Munf. 587. See Preston v. Bowers, 13 Ohio St. 1.

⁶ M'Fadzen v. Ollivant, 2 J. P. Smith, 486.

⁷ Rigaut v. Gallisard, 7 Mod. 78, 82.

⁸ 1 Chit. Pl. 139.

(a) In reference to cruelty and violence of the husband towards the wife, as justifying a desertion of him by her, and rendering him liable for her subsequent support; see Breinig v. Meitzler, 23 Penn. 156; Eshbach v. Eshbach, Ib. 343; Harrison v. Harrison, 20 Ala. 629.

As to abuse of a husband by his wife,

and consequent violence done to her; see Gordon v. Gordon, 48 Penn. 226. As to duress upon a married woman, see Eadie v. Shinnion, 26 N. Y. (12 Smith) 9.

In New York, a wife cannot maintain an action against the husband for slander. Freethy v. Freethy, 42 Barb. 641.

force being implied, and the wife and servant being considered as having no power to consent."¹ And upon the same subject it is remarked by another elementary writer: "The husband's remedy against the seducer of his wife may be in trespass, or by an action on the case. The latter is preferable, where there is any doubt whether the fact of adultery can be proved, and there is a ground of action for enticing away or harboring the wife without the husband's consent; because a count for the latter offence may be joined with the former; and a count in trover for wearing apparel, &c., may be added."²

§ 18. Evidence must be given of a *marriage in fact*. (a) Cohabitation, reputation, or other circumstances from which it may be inferred only, do not amount to evidence of an actual marriage.³ But evidence of a marriage *de facto* and cohabitation, followed by proof of criminal intercourse, between the defendant and a woman who passed for the plaintiff's wife, is sufficient to go to a jury, without absolute proof of the identity of the former woman and the latter.⁴

§ 19. In this action, as upon applications for divorce, where the point has most frequently been raised, direct evidence is not necessary to prove the fact of adultery. The circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.⁵ *General cohabitation* is of itself sufficient proof.⁶ And where criminal intercourse is once proved, it will be presumed to continue while the parties remain under the same roof.⁷ So adultery may be proved, on the part of the wife, by birth of a child, the husband being out of the realm. Or, in the case of the husband, by the birth, maintenance, and acknowledgment of a child.⁸ Or by his visiting a known brothel, more especially if he remain alone for some time in the room with a prostitute.⁹

§ 20. It is a good defence, that the parties have separated by agreement, the husband relinquishing all claim to the person of

¹ 1 Chit. Pl. 164.

² 2 Greenl. Ev. § 40, n.

³ Morris v. Miller, 4 Burr. 2057, 2059.
See Com. v. Belgard, 5 Gray, 95.

⁴ Hemmings v. Smith, 4 Doug. 33.

⁵ Loveden v. Loveden, 2 Hagg. Con. 3,
3. See Mosser v. Mosser, 29 Ala. 313;
see State v. Marvin, 35 N. H. 22.

⁶ Cadogan v. Cadogan, cited in 2 Hagg. Con. 4 n.

⁷ Turton v. Turton, 3 Hagg. Ecc. 350.

⁸ Richardson v. Richardson, 1 Hagg. Ecc. 6; D'Aguilar v. D'Aguilar, Ib. 777, n.

⁹ Astley v. Astley, 1 Hagg. Ecc. 720.

(a) This rule, however, is often changed by express statute.

the wife.¹ Although *recrimination* is a good bar to divorce for adultery, it is very doubtful whether the defence is allowable in an action for damages; though it may go in mitigation of damages.² *Collusion, sufferance, or connivance*, is a defence. But not mere negligence, confidence, or lack of observation; which, however, as well as loose and improper conduct of the husband, may go in mitigation of damages. But not that the plaintiff is ill-tempered, and that, previously to the illicit intercourse charged, he and his wife lived unhappily, and occasionally came to blows. The connivance may apply to mere improper familiarity, if almost amounting to proximate acts, and more especially to habitually criminal conduct, though with others than the defendant.³

§ 21. Upon the question of *damages*, the relation of the plaintiff to his wife, the circumstances of their domestic life, &c., may be shown. Also the relation between the plaintiff and defendant. And these facts may be proved by the conversation, correspondence, and general deportment of the parties.⁴

§ 22. It was formerly held, that no action for criminal conversation could be brought for any act of adultery committed after a *separation* between husband and wife.⁵ But the authority of this decision has been questioned, and it has been since decided, that, where a husband and wife entered into a deed, with a provision that in a certain event, and upon the consent of the trustees, the wife should be permitted to live separate, and she did live separate, from her husband, but without the consent of the trustees, and then committed adultery; the husband might bring an action for criminal conversation against the adulterer. More especially as the deed contained a proviso, in case of such separation, for the attendance and care of the mother to her children, whereby the husband did not give up all claim to the comfort and assistance of the wife.⁶

§ 23. In general, a husband may maintain an action for *enticing*

¹ *Chambers v. Caulfield*, 6 E. 244; *Wilton v. Webster*, 7 C. & P. 198; *Meedon v. Timbrell*, 5 T. R. 357.

² *Beeby v. Beeby*, 1 Hagg. Ecc. 789; *Bromley v. Wallace*, 4 Esp. 237; *Wyndham v. Wycombe*, 1b. 16.

³ *Van Vacter v. M'Killip*, 7 Blackf. 578; *Pierre v. Pierre*, 3 Pick. 299; *Hodges v. Windham*, Peake, Cas. 39; *Rogers v.*

Rogers, 3 Hagg. Ecc. 58; *Crews v. Crews*, 1b. 128; *Moorsum v. Moorsum*, 1b. 95; *Foley v. Peterborough*, 4 Doug. 294; *Smith v. Alison*, Bull. N. P. 27; 2 Greenl. Ev. § 51.

⁴ 2 Greenl. Ev. § 55.

⁵ *Weedon v. Timbrell* 5 T. R. 357.

⁶ *Chambers v. Caulfield*, 2 J. P. Smith, 356; 6 E. 244.

away his wife, or inducing her to live apart from him, even against the wife's father. And in such action it is sufficient to state, that "the defendant unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent, &c., by means of which persuasion she did continue absent, &c., whereby the plaintiff lost the company and society of his wife," without setting forth the means used by the defendant.¹ Evidence of a report that the plaintiff ill-treated his wife is not admissible in justification. Nor are her mere statements of such treatment any justification. It must be proved. The party is liable to an action, unless she was justifiable in leaving her husband.² But it is held that an action cannot be maintained without proof of improper motives.³ More especially against the father of the wife.⁴ And a father, whose daughter was married, against his will, to a man who at the time of the marriage was, and ever since had been an habitual drunkard, whose habits of drunkenness were one ground of objection on the part of the parents to the marriage, who had been, since the marriage, in the habit of frequenting houses of ill-fame, and boasted of his intercourse with lascivious and lewd women, and who had no means of supporting a family, and was lazy, thriftless, and idle; has the right to receive her into his home, and even advise her to leave her husband, and no action can be maintained against him, under these circumstances, for enticing her away.⁵ So a third person may sometimes harbor a wife, when he would not be justified in advising her to leave, or carrying her away from the husband.⁶ And one permitting his wife's mother to reside in his house, and affording her the rights of hospitality, although forbidden by the husband of the mother, is not liable to the action of the husband for illegally harboring his wife.⁷

¹ Winsmore v. Greenbank, Willes, 577.

² Barnes v. Allen, 30 Barb. 663.

³ Schoraimean v. Palmer, 4 Barb. 225.

⁴ Hutcheson v. Peck, 5 John. 196.

⁵ Bennett v. Smith, 21 Barb. 439.

⁶ Barnes v. Allen, 30 Barb. 663.

⁷ Turner v. Estes, 3 Mass. 317.

CHAPTER XLIII.

PARENT AND CHILD.

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| 1. Seduction; founded on the presumption of service. | 7. Form of action. |
| 2. In case of children under age. | 8. Defence. |
| 4. Children of age. | 10. Damages. |
| 5. Loss of service; proof and nature of. | 12. Abduction. |
| 6. By whom the action may be brought. | 13. Other injuries to minor children. |
| | 16. Infants. |

§ 1. CHIEF among the injuries connected with the relation of parent and child, is that of *seduction*. (a)

§ 2. Upon this subject the rule is well established, that, while an action for seduction cannot be maintained in the name of the female who has been seduced,¹ (b) the father may maintain an action

¹ *Hamilton v. Lomax*, 26 Barb. 615.

(a) The word "seduce," when used with reference to the conduct of a man toward a woman, has a precise and determinate signification, and it is not necessary, in an information for the crime of seduction, to charge the offence in any other language. And although a statute uses the terms "seduce and commit fornication," yet the word "seduce," *ex vi termini*, implies the commission of fornication. *State v. Bierce*, 27 Conn. 319.

In an action for seduction, it is no ground of nonsuit, that by the plaintiff's evidence the offence was *rape* and not seduction. Whether it was so or not, is a question for the jury on the evidence. *Furman v. Applegate*, 3 Zab. 28.

Upon the plea of not guilty, the Court are bound, if so requested, to instruct the jury, that criminal connection may take place between the parties without seduction; and that, if seduction was not proved, damages for it should not be given. *Hill v. Wilson*, 8 Blackf. 123.

Pregnancy is the ordinary injurious result, which furnishes the ground of action. But an action also lies for communicating to a daughter the venereal disease which disabled her from labor. *White v. Nellis*, 31 N. Y. (4 Tiff.) 405.

(b) Contrary to the general rule, that a fe-

male cannot herself maintain an action for seduction, being *in pari delicto*; the following case recently occurred in Connecticut. An action was brought upon a note, by a girl under age, by her next friend, in which the declaration alleged, that the defendant, fraudulently, and with the intention of getting her within his power for purposes of prostitution, she being then but fourteen years of age, destitute, without relatives, and in the care of a charitable society in New York, represented to her, and to the persons who had her in charge, that he wanted her to go to his house in this State, and live in his family as a servant, and that he was a suitable person to take charge of her for that purpose; and that, with the advice of her friends, she came to his house with him for the purpose, and that, while she was living in his house, the defendant, by taking advantage of her ignorance and dependence, and want of friends, and of her fear of him, persuaded her to submit to carnal intercourse with him, and that he thus debauched her and ruined her character and prospects in life, and in settlement for this injury the note was given. Held, the action would lie, and the declaration was good on demurrer. *Smith v. Richards*, 29 Conn. 232.

of seduction, when the relation of *master and servant* exists, in fact or by construction, at the time of the seduction; but not otherwise.¹ (a) And such relation must be set forth in the declaration.² But, though the daughter receives part of her wages, and is under age, yet, if she is not the servant of the father, he cannot maintain the action.³

§ 3. After the majority of the daughter, the father may maintain an action for her seduction, while a minor.⁴ And the relation of master and servant exists *constructively* between a father and his *infant* daughter, so that he may sue for her seduction, although she is actually in the service of another, provided the father has at any time a right to reclaim her services.⁵ Or though she has left her father's house with his consent, without intending to return, and with his license to appropriate her time and services to her own use.⁶ Thus the plaintiff's daughter, who had formerly been in the defendant's service, and was living with her parents, at the defendant's request, and with the consent of the plaintiff, went and resided at the defendant's house for a month, to attend to his business during the absence of his wife; and the defendant promised, before she went, to pay her something for so doing, and, when she left, the defendant's wife gave her eight shillings. During the time she so resided with the defendant, he seduced her. Held, the above facts were not inconsistent with the relation the daughter held, of servant to the plaintiff, and that an action for her seduction was maintainable by him.⁷ So a father, liable for the expenses of the lying-in of his minor daughter, though she has been permitted to leave his house, and was *de facto* the servant of another person, and he had relinquished all claim to her services, and though he has actually paid nothing; may maintain an action for the seduction.⁸ So a daughter, of the age of nineteen years, with the consent of her father, went to live with her uncle and aunt, for whom she worked when she pleased, and the

¹ Mulvehall v. Millward, 1 Kern. 343; Ingersoll v. Jones, 5 Barb. 661; 11 Geo. 603; 14 Ala. 235; 1 J. P. Smith, 373.

² Lee v. Hodges, 13 Gratt. 726.

³ Carr v. Clarke, 2 Chit. 260; M'Daniel v. Edwards, 7 Ired. 408.

⁴ Stevenson v. Belknap, 6 Clarke (Iowa), 97.

⁵ Bolton v. Miller, 6 Ind. 262; 14 Ala. 235; 11 Geo. 603.

⁶ Boyd v. Byrd, 8 Blackf. 113.

⁷ Griffiths v. Teetgen, 28 Eng. L. & Eq. 371; 15 Com. B. 344.

⁸ Clark v. Fitch, 2 Wend. 459.

(a) Where, at the time the seduction occurred, the person seduced was at service in another family, the Judge may submit to the jury to determine, whether the plain-

tiff was at the time entitled to the wages of the person seduced. Ingersoll v. Jones, 5 Barb. 661.

uncle agreed to pay her for her work ; but there was no agreement for her continuance in his house for any time. While in the house of her uncle she was seduced and got with child, and immediately after returned to her father's house, where she was maintained, and the expenses of lying-in paid by him ; though she had no intention, under other circumstances, of returning to live with her father. Held, an action on the case, *per quod servitium*, &c., was maintainable by the father ; he not having divested himself of the power to claim her services ; and the relation of master and servant being presumed, from his right to her service, arising from his liability to maintain and provide for her while under age.¹ But to sustain an action for seduction, it is necessary to show something like the relation of master and servant, however slight the degree. Thus, a father, who has indented his daughter to another man as a servant, being no longer entitled to her services, cannot maintain an action of seduction against him.² Nor will the action lie, where the daughter does not reside in the father's family, and has no intention of returning to it, although she is not residing as a hired servant elsewhere.³ So a parent cannot maintain an action for the seduction of a daughter, who lives as a domestic servant in the house of her master, although with his permission she is in the habit, during her leisure time, of assisting in the work by which her parent earns his livelihood.⁴ So where the daughter rented a house, and carried on the business of a milliner at the time of her seduction ; the circumstance of her mother and the younger branches of her family residing with her, and receiving part of their support from the proceeds of her business (the father lodging elsewhere), does not constitute such "services," as to entitle the father to maintain the action.⁵ So where a daughter, at the age of eight or nine years, left the residence of her mother, at the suggestion of friends, because the mother was a common prostitute, and went to reside in the family of the defendant, where she continued until she was seventeen or eighteen years of age, when she was seduced by him, and left the State with him, and went to Louisiana, where she was delivered

¹ *Martyn v. Payne*, 9 Johns. 387 ; acc. *Dean v. Peel*, 5 E. 45 ; *Davies v. Williams*, 10 Ad. & Ell. N. S. 725.

² *Dain v. Wycoff*, 3 Seld. 191.

³ 1 J. P. Smith, 333.

⁴ *Thompson v. Ross*, 5 Hurl. & Nor. 16.

⁵ *Manly v. Field*, 7 C. B. (N. S.) 96.

of a child; and, from the time she left her mother's house, there was no intercourse between the mother and daughter; and the mother continued a prostitute: held, that the mother could not maintain an action for seduction.¹

§ 4. A father may also maintain an action for the seduction of his daughter, whether over twenty-one or not, provided she is in his service at the time of her seduction.² (a) As, if she is living with her father,³ and under his control; though there is no express contract for services between them. Such contract will be presumed from any services, however slight, rendered by her in the family.⁴ Thus where a daughter, twenty-nine years of age, resides with her father, and, by a tacit understanding, continues to render certain services, and is supplied by him with food and clothing; an action lies for her seduction, though she is at the time absent.⁵ So a father may maintain trespass for the seduction of his daughter and servant, whom he maintains, in consideration of her services, though she be a married woman.⁶ But a father cannot maintain an action of trespass, for assaulting and debauching and getting his daughter with child, *per quod*, &c., where the daughter is above the age of twenty-one years; unless she is actually in his service.⁷ Thus the action does not lie, where the daughter was at the time of seduction in the service of another person;⁸ unless, during some portion of her pregnancy or lying-in, she is a member of the parent's household.⁹ Nor where a daughter lived away from her father's house, under a contract made by herself after she became of age, and received to herself the benefit.¹⁰

§ 5. For the reason above stated, that this action is founded upon the relation of master and servant, no action will lie for debauching a daughter, though the mother maintain her and her

¹ *Roberts v. Connelly*, 14 Ala. 235.

² *Keller v. Donnelly*, 5 Md. 211; *Millar v. Thompson*, 1 Wend. 447; *Nicholson v. Stryker*, 10 Johns. 115.

³ *Booth v. Charlton*, cited in 5 E. 47; 11 Geo. 603.

⁴ *Kendrick v. McCrary*, 11 Geo. 603; *Moran v. Dawes*, 4 Com. 412.

⁵ *Lipe v. Eisenlerd*, 32 N. Y. (5 Tiffa.) 229.

⁶ *Harpur v. Luffkin*, 1 Man. & Ry. 166.

⁷ *Nickleson v. Stryker*, 10 Johns. 115.

⁸ *Postlethwaite v. Parke*, 3 Burr. 1878.

⁹ *Parker v. Meek*, 3 Sneed, 29.

¹⁰ *Lee v. Hodges*, 13 Gratt. 726.

(a) Testimony of what took place between the daughter and her seducer, after the former was twenty-three years of age, is not admissible to show loss and depriva-

tion of society, but may be admitted to explain and illustrate what took place between the parties five years previously. *Keller v. Donnelly*, 5 Md. 211.

child during her lying-in, unless on the ground of the loss of service.¹ But a parent may maintain an action for the seduction of his daughter over twenty-one years of age, where the daughter renders services to the parent which are interrupted by the seduction; though such service be very slight.² Or if she became, in consequence, incapacitated in any material degree, for rendering any services which the plaintiff might lawfully demand of her.³ And though there be no express contract for services, a contract will be presumed from any services, however slight, rendered by her in the family.⁴ And the general rule is laid down, that in an action for seduction, brought by the parent, who has a right to the service of the daughter, if the seduction is proved, the loss of service will be presumed, and need not be proved.⁵ Especially if the daughter is a minor, residing with her father, and he has a right to claim her services.⁶ So the action may be maintained by a step-father for the seduction of a step-daughter, who had been taken into his house, and brought up as one of his own children, and in relation to whom he had assumed the place of a father and a protector; where the female seduced was nursed and provided for, during her confinement, by the plaintiff's wife, and the expenses of her lying-in were borne by the plaintiff; although at the time of her seduction she resided in the family of another person.⁷

§ 6. An action may be sustained, not only by a parent, but by a guardian, master, or other person, standing *in loco parentis* to the person seduced. If such person is a minor and legally under the control of, or required to render service to, the plaintiff; the action will be sustained, whether she resided with him or elsewhere. If not a minor, she must reside with and render service to him, but slight acts of service will sustain the action.⁸ Thus a step-father, who has adopted the illegitimate daughter of his wife into his family, stands *in loco parentis*, and can maintain an action for her seduction.⁹ So an action may be brought by a mother against the seducer of her daughter, who had been bound as an apprentice, but, the indentures being cancelled, had returned to

¹ *Satterthwaite v. Dewhurst*, 4 Doug. 315.

² *Vossell v. Cole*, 10 Mis. 634; 11 Geo. 603; 15 Barb. 279.

³ *Knight v. Wilcox*, 15 Barb. 279.

⁴ *Kendrick v. McCrary*, 11 Geo. 603.

⁵ *Anderson v. Ryan*, 3 Gilm. 583; *Bartley v. Richtmyer*, 2 Barb. 182.

⁶ *Hewitt v. Prime*, 21 Wend. 79.

⁷ *Bartley v. Richtmyer*, 2 Barb. 182.

⁸ *Ball v. Bruce*, 21 Ill. 161.

⁹ *Bracy v. Kibbe*, 31 Barb. 273.

the plaintiff's house, and there given birth to a child.¹ So, until a girl is eighteen, her mother, when left her natural guardian, is entitled to her services, unless the girl is apprenticed to some trade; and if before that age she be debauched, the mother may maintain an action against her seducer, if the girl was in her service at the time. But a mother is not entitled to the services of her daughter after she is eighteen years of age, nor can she maintain an action for her seduction after that age, unless in her employ. Otherwise, if induced to leave her before she is eighteen, and then seduced.² Nor can a mother maintain an action for the seduction of her daughter in the life-time of the father, although the child was not born till afterwards.³ Nor can an action be maintained by a mother, after the death of her husband, for the seduction of her daughter in his life-time, where, at the time of the seduction, the daughter was over twenty-one years of age, and was residing with her brother at his residence, and taking charge of his family; although she shortly afterwards returned to her mother's house, and remained there till after her confinement, and was taken care of by her.⁴ And the executors and administrators of a deceased father cannot maintain an action for the seduction of his daughter in his life-time.⁵

§ 7. With regard to the form of action for this injury, it is sometimes held, that an action for debauching the plaintiff's daughter, *per quod servitium amisit*, is an action of *trespass*; and therefore a count thereon may be joined with a count for breaking and entering the house.⁶ But *an action on the case* always lies by a master for the seduction of his servant, even where by the proof trespass could in the particular case have been sustained.⁷ Though such action is not maintainable, unless laid with a *per quod servitium amisit*.⁸ This is the gist of the action. And the distinction is made, that this action may be maintained by the party on whom such damages have fallen. Therefore, where a party seduced lived with her father at the time of seduction, but after his death lived with her mother, by whom the trouble and expense of her lying-in was sustained; it was held, that the latter

¹ Sargent v. —, 5 Cow. 106.

² Keller v. Donnelly, 5 Md. 211.

³ Vossel v. Cole, 10 Mis. 634.

⁴ George v. Van Horn, 9 Barb. 523.

⁵ Ibid.

⁶ Woodward v. Walton, 2 New R. 476.

⁷ Furman v. Applegate, 3 Zab. 28; Ream v. Rank, 3 S. & R. 215; Moran v. Dawes, 4 Cow. 412.

⁸ Satterthwaite v. Duerst, cited in 5 R. 47, n.

might maintain this action. It would be otherwise with the action of trespass *vi et armis*, the gist of which being the illegal entry, it could only be maintained by the father.¹

§ 8. It is a good defence to an action by a father for the seduction of his daughter, that his own misconduct, by way of connivance, co-operated with the defendant's to produce the wrong.²

§ 9. But it is not competent for the defendant to show, that the daughter consented willingly to the seduction, or even that she in fact seduced the defendant, her consent not depriving the plaintiff of his right of action.³ A subsequent marriage between the seducer and seduced, and an acquittal of the former on an indictment for seduction, do not, either alone or together, constitute a complete bar to the father's right to recover, but they go to mitigate the damages.⁴

§ 10. It is held that the plaintiff, to show the nature of the injury and increase the damages, may prove that the defendant promised to marry the daughter, and by that means had succeeded in debauching her.⁵ But the jury must not award to the father any part of the damages which belong to the daughter, by reason of the breach of contract of marriage.⁶ And the distinction has been made, that the plaintiff cannot give evidence of such promise; although he may prove, in showing the circumstances under which the seduction took place, that the defendant addressed her with honorable proposals.⁷

§ 11. *Exemplary damages*, beyond the mere loss of service and payment of necessary expenses, may always be allowed in actions on the case for seduction; whether the suit be brought by a parent or other person suing as master.⁸ As in case of an *adopted* daughter.⁹ Pregnancy and the birth of a child are not essential;¹⁰ but it is not sufficient if the illness of the daughter, whereby she was unable to labor, was produced by shame for the seduction, and would not have occurred but for shame caused by the exposure.¹¹ It has been held, but strongly doubted on appeal, that

¹ Parker v. Meek, 3 Sneed, 29.

² Travis v. Barger, 24 Barb. 614; Vossel v. Cole, 10 Mis. 634. See Fletcher v. Randall, Anth. N. P. 196.

³ M'Aulay v. Birkhead, 13 Ired. 28.

⁴ Eichar v. Kistler, 14 Penn. 282.

⁵ White v. Campbell, 13 Gratt. 573; 20 Penn. 354.

⁶ Phelin v. Kenderdine, 20 Penn. 354.

⁷ Brownell v. McEwen, 5 Denio, 367; Gillet v. Mead, 7 Wend. 193.

⁸ Ingersoll v. Jones, 5 Barb. 661; Irwin v. Dearman, 11 E. 23.

⁹ 11 E. 23.

¹⁰ Knight v. Wilcox, 18 Barb. 212. See Stiles v. Tilford, 10 Wend. 338.

¹¹ Knight v. Wilcox, 4 Kern. 413.

the jury in assessing damages may take into view the wounded feelings of the plaintiff, and not only recompense him, but punish the defendant according to the aggravation of the offence.¹ They may award him compensation for the destruction of his domestic peace, as well as the disgrace cast upon his family.² Or for all that he can feel from the nature of the injury.³ And a plaintiff may show in aggravation of damages any circumstances, the natural consequences of the principal act, although they did not transpire until after suit brought.⁴ So, in trespass for debauching the plaintiff's daughter, the standing of the plaintiff's family may be given in evidence.⁵ So it is held, that he may prove the character of his own family, and the pecuniary circumstances of the defendant.⁶ If the conduct of the daughter has been lewd, the damages will be strictly limited to the loss of service during pregnancy.⁷

§ 12. Analogous to the injury of seduction, is that of the *abduction* of a child from its parent. Thus the plaintiff had a verdict for damages, in an action of trespass *vi et armis*, for the abduction of his daughter, who was under twenty-one years of age; and, on motion in arrest of judgment, the action was held to be maintainable, although it was not laid in the declaration that thereby the plaintiff lost the services of his child, and although there was no evidence of a forcible taking.⁸ But a father who lives apart from his wife, and suffers his son, a minor, to remain under the custody and care of the wife, to be supported and employed by her, or allows such son to go from him, and employ himself as he pleases, and takes his wages; cannot maintain an action against a third person, on a declaration that the defendant enticed and carried away the son from the plaintiff's own care and custody. And where a minor, thus left to the care of his mother, or thus allowed to employ himself, ships for a voyage to sea at the request of the mother; the father cannot, by forbidding the ship-owner to take the son to sea, entitle himself to maintain an action against the ship-owner on such declaration.⁹ Nor can a father maintain an action against one who procures the marriage of his daughter, if

¹ Knight v. Wilcox, 18 Barb. 212; doubted in S. C. 4 Kern. 413.

² Kendrick v. McCrary, 11 Geo. 603.

³ Phelin v. Kenderdine, 20 Penn. 354.

⁴ Hewitt v. Prime, 21 Wend. 79.

⁵ Keplinger v. Sherrick, Wright, 104.

⁶ McAulay v. Birkhead, 13 Ired. 28.

⁷ Fletcher v. Randall, Anth. N. P. 196 and n.

⁸ Kirkpatrick v. Lockhart, 2 Brev. 276.

⁹ Wodell v. Coggeshall, 2 Met. 89.

the daughter in good faith, and without force or imposition, enter into the marriage contract, when between twelve and fourteen years of age.¹

§ 13. In reference to other claims and liabilities, as well as that for seduction, the relation of parent and child, though the latter lives with, and is under the control of its father, does not necessarily constitute the relation of master and servant; without which an action cannot be maintained by the father, but only by the child.² It is held that a parent cannot maintain an action for retaining a child from him. *Habeas corpus* is the only remedy.³ So it has been held, that a father cannot maintain trespass for an injury to a child only two years and a half old, "*per quod servitium amisit*;" as the child is incapable of performing acts of service.⁴ More especially a parent, suffering his infant child to play unattended in the streets, cannot recover damages for the injury of the child by the wagon of one engaged in his lawful business, and guilty of no negligence.⁵ So where a minor left his father's service, and went to a port where he was a stranger, and there shipped as of full age, for a whaling voyage, during which he perished; it was held, that the father could not maintain an action for the loss of the services and society of the son, arising from his death, unless the person who shipped him knew that he was a minor.⁶ But other cases hold, that trespass lies by a father, for a forcible injury to his son, *per quod*, &c.⁷ So if a legitimate infant child, a member of his father's household, though too young to be capable of rendering any services to his father, is wounded or otherwise injured, by a third person, or by a mischievous animal owned by a third person, under such circumstances as give the child himself an action against such person, for the personal injury, and the father is thereby necessarily put to trouble and expense in the care and cure of the child; he may maintain an action against such person for an indemnity.⁸ And the owner of a dog that injures a minor child, so that the parent, by reason of such injury, loses the child's services, and is put to expense for his cure, is liable to the parent, under Rev. Sts. of Massachusetts, c. 58, § 13, for double the damages by him

¹ Goodwin v. Thompson, 2 Greene, 329.

² 15 Ind. 73.

³ Dowling v. Todd, 26 Mis. 267. (Under what circumstances this may be maintained, see the People v. Olmstead, 27 Barb. 9.)

⁴ Hall v. Hollander, 7 Dowl. & Ry. 133; 4 B. & C. 660.

⁵ Kreig v. Wells, 1 E. D. Smith, 74.

⁶ Cutting v. Seabury, Sprague, 522.

⁷ Hammer v. Pierce, 5 Har. 304.

⁸ Dennis v. Clark, 2 Cush. 347; 7 Dowl. & Ry. 133.

thus sustained.¹ More especially a father may sue in case for an injury done to an infant child (then living with him and engaged in his service) by dogs, permitted by the defendant to run at large, after knowledge that such dogs were accustomed to bite mankind.² So the father of a minor daughter, living with, and performing labor for him, may, under the provisions of the Rev. Sts. of Maine, c. 26, maintain an action for damages sustained by him in the loss of her services, occasioned by an injury caused by a collision on the highway, which was owing to the defendant's negligence and misconduct, by means of which collision the daughter was thrown from her father's wagon.³ So in an action on the case for harboring the plaintiff's minor son, if the defendant, knowing that the son had run away from his father, board him in his family, and allow him to work on his farm as he pleases, and do this with the intention of aiding or encouraging, or with the knowledge that it aided or encouraged the son to keep away from the father; he is liable to the action.⁴ (a)

§ 14. The parent of a child, expelled from a public school, cannot maintain an action against the school committee by whose orders it was done.⁵ So the teacher of a town school is not liable

¹ *M'Carthy v. Guild*, 12 Met. 291.

² *Durden v. Barnett*, 7 Ala. 169. See *Arnold v. Norton*, 25 Conn. 92.

³ *Kennard v. Burton*, 25 Maine, 39.

⁴ *Sargent v. Mathewson*, 38 N. H. 54.

⁵ *Donahoe v. Richards*, 38 Maine, 376.

(a) In Missouri, an action by a father against a common carrier, for damages arising from the death of his son, which was occasioned by the defendant's negligence, survives to the plaintiff's representatives; but damages are limited to the actual value of the son's services to the estate. *James v. Christy*, 18 Mis. 162.

Where, upon a decree of divorce, the custody of a child of four years of age was assigned to the mother, and the father afterward, with a strong hand, seized the child, then in the mother's custody, and against her will, and carried it out of the State; held, this constituted the statute offence of unlawfully and forcibly carrying the child out of the State, and it was not necessary to prove expressly that it was done without its consent, inasmuch as in law the child was incapable of consent. *State v. Farrar*, 41 N. H. 53.

Recent statutes often provide an action by a father for injury resulting from the death of his son. But such an action cannot be maintained, without some evidence of actual pecuniary damage. 4 Hurl. & N. 653. See *Whitford v. Panama, &c.* 23 N. Y. (9 Smith), 465.

Where the father was old and infirm, and the son, who was young, and earning good wages, assisted his father in some work for which the father was paid 3s. 6d. a week; the jury having found that the father had a reasonable expectation of benefit from the continuance of his son's life, it was held that the action was maintainable. *Franklin v. South-Eastern, &c.* 3 Hurl. & Nor. 211.

In an action, on the 9 and 10 Vict. c. 93, by a father, for injury resulting from the death of his son, it appeared that the father was a working mason, and that the son was a boy of fourteen years of age, who had earned 4s. a week for a year or two, but at the time of his death was without employment. There was no evidence of the cost of boarding and clothing the boy. The judge having left it to the jury to say, whether the father had sustained any pecuniary loss by the death of his son, and the jury having found a verdict with £20 damages; held, as there was evidence for the jury, the plaintiff was entitled to retain the verdict for the full amount. *Duckworth v. Johnson*, 4 Hurl. & Nor. 653.

to any action by a parent for refusing to instruct his children.¹ So a parent cannot maintain an action against trustees, for refusing to his child admission to a district school.² (a)

§ 15. In connection with the subject of this chapter, may be briefly stated the privileges and liabilities of *infants* in relation to torts or wrongs. (b) For these, infants are generally responsible, although they are not bound by their contracts. Thus infancy is no defence to an action of trover or trespass for the unlawful conversion of property.³ And an infant, in an action *ex delicto* for an injury to property, is as fully liable for the damages as if he had been of full age.⁴ So an infant is liable in *trespass quare clausum*, though the trespass was committed by the express command of his father.⁵ So ejectment lies against an infant for disseizin.⁶ So for a mere *fraud*, an infant may be liable to an action.⁷ (c) But infancy is a good defence to an action on the case for deceit and false warranty, or false and fraudulent warranty, in the sale of goods.⁸ Nor is a defendant estopped from setting up infancy as a defence to a contract, by his fraudulent representations that he was of full age.⁹ And it is not a legal fraud, if one repudiate an agreement made by him during infancy, and therefore not binding on him, even though he may have enjoyed the fruits of such agree-

¹ Spear v. Cummings, 23 Pick. 224.

² Boyd v. Blaisdell, 15 Ind. 73.

³ Baxter v. Bush, 3 Wms. 465.

⁴ Conklin v. Thompson, 29 Barb. 218.

⁵ Scott v. Watson, 46 Maine, 362.

⁶ Marshall v. Wing, 50 Maine, 62.

⁷ Burns v. Hill, 19 Geo. 22.

⁸ Prescott v. Norris, 32 N. H. 101; 19 Verm. 505.

⁹ Merriam v. Cunningham, 11 Cush. 40.

(a) Trespass will lie against a father, for an injury committed by his team, when driven by a son with whom he was riding at the time. Strohl v. Levan, 39 Penn. 177.

Under ordinary circumstances, a young lady living at her father's house may give permission to her friend to drive her out in her father's carriage, and the friend will not be liable for the result of an accident to the horses, not arising from negligence on his part. Bennett v. Gillette, 3 Min. 423.

(b) In an action for the negligence of the defendants, severally of the ages of thirteen and sixteen, where the plaintiff claims only actual damages, the youth of the defendants is not to be taken into consideration, in determining the question of negligence. If the youth of a defendant would in any case be a defence to such an action, yet persons of the above ages must be consid-

ered, in the absence of proof to the contrary, as emancipated from childish instincts, and bound to exercise their rights with ordinary care. Neal v. Gillett, 23 Conn. 437.

(c) Thus an infant who fraudulently obtains goods upon credit, with an intention not to pay for them, is liable in tort to the party injured. Wallace v. Moss, 5 Hill, 391. See Matthews v. Rice, 31 N. Y. (4 Tiff.), 457.

When property is bailed to an infant, his infancy is a protection to him for any non-feasance, so long as he keeps within the terms of the bailment; but when he departs from the object of the bailment, it amounts to a conversion of the property, and he is liable to the same extent as if he had taken the property in the first instance without permission. Towne v. Wiley, 23 Verm. 355.

ment.¹ And it seems that an action of deceit will not lie against an infant, for falsely affirming himself to be of age, whereby he induces another to give him credit for goods.² (a) But an infant must either affirm or avoid his entire contract; and if he affirm it, after he comes of age, by bringing an action upon the notes given in consideration of the sale, he cannot, upon the ground of infancy, preclude the defendant from taking advantage of a false warranty, in any proper manner, as a defence.³ So, if an infant has executed a contract on his part, by the payment of money or delivery of property, he cannot afterwards disaffirm it, and recover back the money or property, without restoring to the other party the consideration received from him. And where an infant has received a horse in exchange for other property, he cannot recover for the latter, upon an offer to return the horse, if he has so misused him as to materially lessen his value.⁴ So where a horse was purchased by a minor, who paid part of the purchase-money, and gave his notes, secured by a mortgage on the horse, for the balance; held, that he could not repudiate the mortgage, and hold the horse against the mortgagee; nor could he maintain trespass against the mortgagee, or his assignee, for taking the horse, under the mortgage; as, in repudiation of the mortgage, he would nullify the sale, and therefore he could not hold the horse under it.⁵ (b)

¹ *Burns v. Hill*, 19 Geo. 22.

² *Price v. Hewett*, 18 Eng. L. & Eq. 523.

³ *Morrill v. Aden*, 19 Verm. 505.

⁴ *Bartholomew v. Finnemore*, 17 Barb. 428.

⁵ *Heath v. West*, 8 Fost. 101.

(a) Under a statute giving a right of action to a woman against one who seduced her; an action lies against an infant for seduction with a promise of marriage. *Lee v. Hefley*, 21 Ind. 99.

(b) The rule, that one holding the property of an infant may be considered as the bailee of such infant, is for the latter's benefit, and for the furtherance of his remedy, and the tort-feasor has no right to set it up for his own benefit against the infant. *Smith v. Reid*, 6 Jones, 494.

A contract by an infant, for the sale of personal property, may be rescinded by him before he arrives at full age. After such rescinding, an action of trespass cannot be sustained against him for taking the property. But where A, in an action of trespass brought by him against B, an infant, for the taking of certain goods, of which the greater part, he claimed, were purchased by him of B, but some were purchased with the avails of goods sold, and others were originally the property of A, B did

not attempt to justify the taking of the goods upon the ground that they were originally his, and were by him sold to A, and that he had rescinded the contract, but on the ground that the goods were never sold to A, but were delivered to C, an infant son of A, to sell and account for (A being merely a surety for C), and that, by the terms of the contract, they were to be redelivered to B, whenever he chose to demand them, and that such demand had been made, and C had refused to deliver them; the defence proceeding, not on the ground that the contract had been rescinded, but in affirmance of it; the Court submitted the question of title in the plaintiff to the jury, and a verdict was given for him: it was held, 1. That B had no cause of complaint, on the ground that his contract with A had been rescinded; 2. That, if such contract had been rescinded, still the defence did not cover the whole ground, and A was entitled to retain his verdict. *Shipman v. Horton*, 17 Conn. 481.

CHAPTER XLIV.

BAILMENT.

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|-------------------------------|------------------------------|
| 1. Bailment is a contract. | 7. <i>Commodatum</i> — loan. |
| 2. Various kinds of bailment. | 8. <i>Locatio</i> — hiring. |
| 3. <i>Deposit</i> . | 9. <i>Warehousemen</i> . |
| 5. <i>Mandate</i> . | |

§ 1. ANOTHER relation, which gives rise to numerous and various torts, is that of *Bailment*. Bailment is a contract, but, as has already been explained (Vol. I. chap. 1), the violation of this contract may often, at the election of the bailor, be treated as a simple wrong. It is therefore necessary to present a summary view of the subject, as falling within the plan of the present work.¹

§ 2. Bailment is of various kinds, demanding different degrees of diligence, and creating a liability for different degrees of negligence, on the part of the bailees. These varieties of responsibility depend in part upon the equitable consideration, whether the bailor; or the bailee, or both, receive the benefit and profit of the bailment: and in part, upon grounds of public policy, which have always applied to certain forms of bailment a very stringent rule of care and fidelity. In ordinary cases of bailment, uncontrolled by special stipulations, and in the absence or negligence or misconduct on the part of the bailee, an injury to property bailed falls on the bailor.² (a)

§ 3. *Depositum* is a deposit without compensation or reward.³

§ 4. A depositary is liable only for *gross negligence*; which is a

¹ See *Smith v. New York, &c.* 43 Barb. 225.

² *Conwell v. Smith*, 8 Ind. 530.

³ 1 Pars. on Con. 572. See *M'Kay v. Draper*, 27 N. Y. (13 Smith), 256.

(a) A bailee is responsible, though the owner knew and acquiesced in the degree of care exercised; more especially if he did not know all the circumstances, or informed the bailee that the mode of keeping was unsafe. *Conway v. American, &c.* 8 Allen, 512.

A bailee is not responsible, though the goods were illegally detained, if the owner has since agreed to accept and pay for them; a reasonable time having elapsed for their removal. *Carnes v. Nichols*, 10 Gray, 369.

question of fact for the jury.¹ (a) And a bailee without hire may terminate his custody at any moment, giving reasonable opportunity to the owner to remove his goods.²

§ 5. *Mandatum* or *mandate* is a gratuitous commission, wherein the mandatary agrees to do something with or about the thing bailed.³ The distinction is made, that, if one be requested to do something in relation to property, which is not delivered to him, nor any consideration paid him, although he undertakes to do it, he is not bound; but if he begin to do it, and then fail to do what he undertakes, he is liable *ex delicto*, although it has been a question much discussed, whether he is liable as upon a contract.⁴ Thus money was intrusted to the defendant, the owner of a steamboat, by the plaintiff, a passenger who paid no more than the regular fare. There was a great crowd; two boats lying near had just been robbed. The money was stolen from the safe, and the extra watchman employed about the boat was not produced as a witness. Held, that the owner was liable as a mandatary, and that there was evidence of a want of the ordinary care, to sustain a verdict for the plaintiff.⁵

§ 6. It is the prevailing rule, that a mandatary is liable for gross negligence only,⁶ which is said to be *dolo proximus*; that is, omitting that care which even the most inattentive and thoughtless never fail to take of their own concerns; and it is a fact to be determined by the jury under all the circumstances of the case.⁷ It is sometimes held, however, that a mandatary is required to use such care as men of common sense and common prudence ordina-

¹ *Doorman v. Jenkins*, 2 Ad. & Ell. 256; *Jourdan v. Reed*, 1 Clarke (Iowa), 135.

² *Roulston v. McClelland*, 2 E. D. Smith, 60.

³ 1 Pars. on Con. 572. See *Lloyd v. Barden*, 3 Strobb. 343.

⁴ *Wilkinson v. Coverdale*, 1 Esp. 75; *French v. Reed*, 6 Binn. 308; 1 Pars. on Con. 581; *Thorne v. Deas*, 4 Johns. 84.

⁵ *Jenkins v. Motlow*, 1 Sneed, 248.

⁶ *Lampley v. Scott*, 24 Miss. 528. See *Chouteau v. Steamboat*, &c. 20 Mis. 519; *Kemp v. Farlow*, 5 Ind. 462; *Dart v. Lowe*, 5 Ind. 131; 17 Ill. 170; *Conner v. Winton*, 8 Ind. 315.

⁷ *McNabb v. Lockhart*, 18 Geo. 495.

(a) In case of *finding* property, the standard of gross negligence is applied. *Dougherty v. Posegate*, 3 Clarke (Iowa), 88.

Gross negligence is held equivalent to *fraud*. *Tudor v. Lewis*, 3 Met. (Ky.) 378.

A deposit of bank-bills with a banking company, unless special, creates a debt, not a bailment. *Wray v. Tuskegee, &c.* 34 Ala. 58.

One who receives claims to collect, though without compensation, is bound to use ordinary diligence. *Moore v. Gholson*, 24 Miss. 372.

It has been sometimes laid down, that a depositary is required to take no more care of the property than he does of his own. But the later and better doctrine is, that the individual general character of the bailee is not a proper subject of inquiry. 1 Pars. on Con. 574; *The William*, 6 Rob. Adm. 316.

It is said, a depositary may maintain trover, which requires only *possession*; but not *replevin*, for which *property* is necessary. 1 Pars. on Con. 578.

rily take of their own affairs;¹ and that, if he undertake the business submitted to him, he is bound to use a degree of diligence and attention adequate to the performance of his undertaking; and whether or not such diligence has been used, is a question for the jury.² So it is said, where the work requires peculiar skill and care, a mandatary is responsible therefor.³ Not, however, in general, the greatest amount of skill, but only such as is usually exercised in his profession.⁴

§ 7. Another form of bailment is the *commodatum* or loan; which being a *gratuitous* bailment,—though, unlike the forms already considered, the gratuity is for the benefit of the bailee and not the bailor,—the bailee is bound to take *extraordinary care*,⁵ and is responsible for injury arising from the *slightest neglect*, though not for a loss occurring wholly without his default.⁶ (a)

§ 8. Another, and the most comprehensive and important form of bailment, is that termed *locatio* or *hiring*, for a reward or compensation. Without reference to those special kinds of hiring, which will be hereafter considered, and which, for peculiar reasons, involve the most rigid degree of responsibility; a bailee for hire is bound to use *ordinary diligence and care* in the protection of the property hired, which will vary in degree according to the nature of the property, and the circumstances in which it is placed.⁷ Ordinary diligence means that degree of care, attention, and exertion, which, under the circumstances, a man of ordinary prudence and discretion would exercise, in reference to the particular thing, were it his own; or which the generality of mankind use in keeping their own goods of the same kind.⁸ (b) So where work

¹ Skelley v. Kahn, 17 Ill. 170.

² Kirtland v. Montgomery, 1 Swan, 452.

³ 1 Pars. on Con. 588.

⁴ Ib. 589, n.; Percy v. Millsaudon, 20 Mart. 68, 75.

⁵ Phillips v. Condon, 14 Ill. 84; Scranton v. Baxter, 4 Sandf. 5; Howard v. Babcock, 21 Ill. 259.

⁶ Wood v. McClure, 7 Ind. 155.

⁷ Swigert v. Graham, 7 B. Mon. 661.

See Logan v. Mathews, 6 Barr, 417; Runyan v. Caldwell, 7 Humph. 134; Dudgeon v. Teass, 9 Mis. 857. See M'Conike v. New York, &c. 20 N. Y. (6 Smith), 495; Slocumb v. Washington, 6 Jones, 357; Knox v. North, &c. 6 Jones, 415; Tallahassee, &c. v. Macon, 8 Flori. 299; Townsend v. Hill, 18 Tex. 422; Dement v. Scott, 2 Head, 367.

⁸ Mayor, &c. v. Howard, 6 Geo. 213; Jackson v. Robinson, 18 B. Mon. 1.

(a) Where a horse, loaned by the plaintiff to the defendant, was carried to the defendant's house and placed in the common horse lot, so used for many years, though it was somewhat slanting, and the horse, being nearly blind, the weather being wet, slipped and fell upon a stump, breaking its thigh; held these facts did not import such negligence, as to render the

defendant liable. Fortune v. Harris, 6 Jones, 532.

(b) A bailor, who knows the use for which property is bailed, engages that it is suitable to the use for which it is hired, and authorizes the use of it in the ordinary manner, unless there should be some special reasons known to the bailee why it should not be so used. 7 B. Mon. 661.

is done for hire, as in an operation on a diseased horse, ordinary diligence alone is required.¹ There is, also, on the part of the hirer, an implied obligation not only to use the thing hired with due care and moderation, but also not to apply it to any other use, or detain it beyond the time for which it was hired. Otherwise, he is not only responsible for all damages, but, if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor.² So it is the duty of a bailee for hire, if the property be *stolen* from him, to show that he used due and reasonable care of the property.³ (a)

¹ Conner v. Winton, 8 Ind. 315. See Kuehn v. Wilson, 13 Wis. 104.

² 6 Geo. 213.

³ Brown v. Waterman, 10 Cush. 117.

(a) One who negligently receives goods not directed to him incurs the liability of a bailee for hire. Newhall v. Paige, 10 Gray, 366.

In a bailment for hire, the benefit may be contingent. Ibid.

One who has a boat in possession for repairs is answerable for damages sustained by ice, if he launch her carelessly at a time when danger from such a source might easily have been foreseen. Smith v. Meegan, 22 Mis. 150.

But an agreement of a bailee for hire to return the chattel in good order is excused, if, without fault of his, it is destroyed by an irresistible force; as where a barge was destroyed by ice on the Mississippi. M'Evers v. Steamboat, &c. 22 Mis. 187.

An agister of cattle is responsible for their loss, only upon proof of want of ordinary care and diligence. Rey v. Toney, 24 Mis. 600.

A let an ass to B, for a season, B warranting against "accidents," and agreeing to return him sound, or pay \$1,000 if damage should be done to him. Injuries from sickness, lightning, and "accident," were excepted. Soon after the season commenced, the ass was returned, diseased and disabled, by a wound inflicted on him. There was no evidence of negligence or misconduct on the part of B; but witnesses expressed the opinion that the ass had been poisoned, and also that the spermatheca had been punctured. The jury gave a verdict for the defendant, and the court sustained the verdict. Conwell v. Smith, 8 Ind. 530.

A miller, with whom corn is left for grinding, though without notice, is liable for ordinary care. Spangler v. Eicholtz, 25 Ill. 297.

The custody, which the officers of cus-

toms have of goods in a bonded warehouse, is not a possession, but rather a restraint upon removal vested in the government to secure payment of duties, while the possession is in the person who placed them there, or in the owner of the warehouse as his agent. Cartwright v. Wilmerding, 24 N. Y. (10 Smith), 521.

A watchmaker, who receives a watch to repair, is bound to use ordinary diligence in its safe-keeping; if stolen through his negligence, he will be liable, even without demand. Halyard v. Dechelman, 29 Mis. 459.

Where the keeper of a livery-stable permitted the owner of certain horses to go into the stable, at a late hour of the night, and take them out, in consequence of which, a horse belonging to the plaintiff made his escape and was lost, either by passing out with the other horses, or afterwards, a part of the door being left open; held, the owner of the stable was liable for such loss. Swann v. Brown, 6 Jones, 150.

A clause in a lease of furniture, binding the lessee to "surrender the property in as good a condition as reasonable use and wear thereof would permit," does not vary the duty imposed by the law of bailments; and therefore a loss by fire, without fault on the part of the hirer, falls on the owner. Hyland v. Paul, 33 Barb. 241.

Under St. 39 and 40 Geo. III., c. 99, § 24, the injury done to goods pawned, by an accidental fire, on the premises of a pawnbroker, not affirmatively shown to have occurred through the default, neglect, or wilful misbehavior of the pawnbroker, does not authorize a justice to give satisfaction to the pawner; there being no *prima facie* presumption that such fire is owing to the default, &c., of the owner of the premises. Syred v. Carruthers, 1 Ell. B. & E. 469.

§ 9. *Warehousemen* come under this head of bailment.¹

§ 10. Where property, deposited with a warehouseman, is delivered to some person other than the owner, by the mistake or negligence of the bailee, this is, in law, a *conversion* by the bailee, at least after demand.² Thus, in an action against a railroad company, as warehousemen, for a failure to deliver property received by them, the judge instructed the jury, among other things, "that if the property was taken by mistake from the defendants' depot, and they exercised ordinary care in the matter, they would not be liable; but if the defendants' agent delivered it by mistake to a wrong person, they would be answerable." Held, such instructions, taken together, were no cause for a new trial.³ So warehousemen, who give their receipts for goods on storage, are estopped from setting up a want of segregation of the goods receipted for from other goods, in an action against them, by the holder of the receipt, for a conversion of the goods by seizure in an action against a vendor of the plaintiff.⁴ So a roll of carpeting was delivered to the defendant, a storage and forwarding merchant, at his store, on the Erie Canal, to be forwarded as directed, in the usual course of business; the charges to be paid at the end of the route. The defendant omitted to take a receipt, or make a memorandum of the transaction, and failed, when requested, to give any account of the property; which was never received by the owner. Held, the defendant was liable.⁵ (a)

¹ See *Quiggin v. Duff*, 1 M. & W. 174; *Low v. Martin*, 18 Ill. 286; *Cox v. O'Riley*, 4 Ind. 368; *Myers v. Walker*, 31 Ill. 353.

² *Willard v. Bridge*, 4 Barb. 361; *Dufour v. Mephram*, 31 Mis. 577; *Alabama*,

&c. *v. Kidd*, 35 Ala. 209. See *Pierce v. O'Keefe*, 11 Wis. 181.

³ *Lichtenhein v. Boston*, &c. 11 Cush. 70.

⁴ *Goodwin v. Scannell*, 6 Cal. 541.

⁵ *Bush v. Miller*, 13 Barb. 481.

(a) Under such bailment, the bailee may show that the bailor approved of the place of storage, and that the goods were damp when delivered, and liable to mildew; and the bailor, that the goods were in the ordinary trade condition, and that the bailee knew they should have been aired and dried. *Brown v. Hitchcock*, 2 Wms. 452.

In an action against warehousemen for the non-delivery of property bailed to them, the defence was, that the property had been fraudulently taken from their custody, without any negligence on their part, and the plaintiff did not claim that the property had been in fact delivered to any person. Held, the plaintiff could not give evidence of a usage among warehousemen, of taking

receipts from persons to whom property was delivered. *Lichtenhein v. Boston*, &c. 11 Cush. 70.

In case of a regular deposit of wheat with a warehouseman, which requires of the depositary due diligence in the care of the property, and that he should redeliver it to the owner or to his order on demand, on being paid a reasonable compensation for his services; the warehouseman would be liable to the depositor for the value of the wheat, in case he mixes it with other wheat in his warehouse, and ships the same for sale on his own account, notwithstanding he may supply the place of the depositor's wheat by other wheat procured and deposited in the warehouse; and the wheat sup-

§ 11. But a warehouseman is not responsible, where robbers break into the building and carry off the goods.¹ So want of ordinary care in one particular, on the part of a warehouseman, does not render him responsible for a loss occasioned by other and independent causes.² And law does not require a warehouseman to construct his buildings secure from all possible contingencies; but only that they be reasonably and ordinarily safe against ordinary and common occurrences.³ Nor does an agreement to store cotton, in a fire-proof warehouse, devolve on the warehouseman the necessity of providing water and buckets for the extinguishment of fire, there being no such terms in the contract, or custom among warehousemen.⁴ And a warehouseman, who fails to deliver property bailed to him, is bound to show only that the loss occurred without a want of ordinary care or diligence on his part; not necessarily the precise manner in which the loss occurred.⁵

¹ *Williams v. Holland*, 22 How. (N. Y.) 137.

² *Gibson v. Hatchett*, 24 Ala. 201.

³ *Cowles v. Pointer*, 26 Miss. 253.

⁴ *Jones v. Hatchett*, 14 Ala. 743.

⁵ *Lichtenhein v. Boston, &c.*, 11 Cush. 70.

plied to take the place of the depositor's wheat will not protect the warehouseman from liability to the owner. *Chase v. Washburn*, 1 Ohio (N. S.), 244.

When the bailors agreed that the goods should be stored in a certain warehouse at their risk and expense, it was held that their removal, by an agent of the bailees, though without their knowledge, made them liable for the safe-keeping of the goods after their removal. *St. Losky v. Davidson*, 6 Cal. 643.

The strict liability of an innkeeper, or common carrier, does not attach to a *public miller*; but he is bound to exercise a "high degree of care and diligence," in respect of grain left in his custody, and, if the property is lost by his fault, imprudence, or neglect of any precaution becoming his situation, he will be held responsible. *Wallace v. Canaday*, 4 Sneed, 364.

CHAPTER XLV.

BAILMENT. — INNKEEPERS.

1. Degree of responsibility.
 3. To whom responsible; for what property and for what time; *guests and boarders*.

4. Animals.
 4 a. A guest's care of his own goods.
 5. Loss from a party's own negligence.
 6. Lien.

§ 1. ANOTHER class of bailees consists of *innkeepers*. An innkeeper is regarded as an *insurer*.¹ His responsibility is said to be like that of a *carrier*;—as in case of *fire*.² He is bound to keep the goods of his guest, so that they shall be actually safe, except against inevitable accidents, and the acts of public enemies, and of the owners and their servants. He is responsible for well and safe keeping; and proof that there was no negligence in himself or servants is not sufficient for his immunity.³ In other words, an innkeeper is liable for damage happening in his inn to the goods of his guest, unless it is caused by the act of God, or the public enemy, or by the fault, direct or implied, of the guest.⁴ As for goods lost or stolen out of his inn.⁵ And an innkeeper is responsible for property of a guest left in the inn, though not placed in the special keeping of the innkeeper.⁶ So his responsibility for the property extends to every part of his house into which it is usual for such property to be taken; unless there was a different understanding between him and his guest.⁷ (a)

¹ *Gile v. Libby*, 36 Barb. 70.

² *Hulett v. Swift*, 42 Barb. 230.

³ *Shaw v. Berry*, 31 Maine, 478; *Willard v. Reinhardt*, 2 E. D. Smith, 148; 2 Met. (Ky.) 439; *Howth v. Franklin*, 20 Tex. 798.

⁴ *Sibley v. Aldrich*, 33 N. H. 553; *Mason v. Thompson*, 9 Pick. 280.

⁵ *Clute v. Wiggins*, 14 Johns. 175.

⁶ *McDonald v. Edgerton*, 5 Barb. 560.

⁷ *Epps v. Hinds*, 27 Miss. 657.

(a) An admission by an innkeeper, that he left money, intrusted to him for the purpose of taking up a bill, in his cash-box in his tap-room, where it was lost, together with a much larger sum of his own; is evidence of gross negligence. *Doorman v. Jenkins*, 4 Nev. & Mun. 170.

The (Pennsylvania) act of 1794 does not repeal or take away the innkeeper's license; but qualifies, limits, and restrains it. If a traveller come to an innkeeper, on

Sunday, he is bound to receive him, and afford him rest and refreshment, though he may not sell him liquor. *Commonwealth v. Naylor*, 34 Penn. 86.

Though an innkeeper refuse to take charge of goods till a future day, because his house is full of parcels; still he is liable to make good the loss, if the owner stop as a guest, and the goods be stolen during his stay. *Bennet v. Mellor*, 5 T. R. 273.

The liability of an innkeeper extends to

§ 2. In conformity with this principle of liability, where the property of a guest is lost or injured, the burden of proof is on the innkeeper, to show that it occurred without his fault.¹ So if the property of a guest is lost by a burglarious entry of an inn, under circumstances that excuse the innkeeper from all negligence, still he is not exonerated upon presumption merely, without proof of some of the circumstances.² But an action cannot be sustained for property lost by fire, through inevitable casualty or superior force, and without any negligence on the part of the innkeeper or his servants.³ And the *prima facie* presumption, that a loss or damage was occasioned by the negligence of the innkeeper or his servants, may be rebutted; and, if the jury find in favor of the innkeeper as to the negligence, he will prevail on a plea of *not guilty*.⁴

§ 3. Although an innkeeper is the *insurer* of the goods of his guest, yet he is only liable for goods brought into his house by parties in the character of guests.⁵ (a) An innkeeper is said to be one who receives as guests all who choose to visit his house, without any previous agreement as to the time of their stay, or the terms.⁶ A person who does not hold himself out as an innkeeper, but entertains travellers occasionally for pay, is not an innkeeper,

¹ Johnson v. Richardson, 17 Ill. 302; 5 Ad. & Ell. N. S. 164.

² McDaniels v. Robinson, 26 Verm. 316.

³ Merritt v. Claghorn, 23 Verm. 177.

⁴ Dawson v. Chamney, 5 Ad. & Ell. N. S. 164; Laird v. Eichold, 10 Ind. 212.

⁵ Mateer v. Brown, 1 Cal. 221. See Carter v. Hobbs, 12 Mich. 52.

⁶ Wintermute v. Clark, 5 Sandf. 242.

all the movable goods and money of the guest, which are placed within the inn, and is not restricted to such things and sums only as are necessary and designed for the ordinary travelling expenses of the guest. *Berkshire, &c. v. Proctor*, 7 Cush. 417.

So if he is accustomed to receive packages for the accommodation of guests, though not baggage; he will be liable therefor. *Needles v. Howard*, 1 E. D. Smith, 54.

But he is held not liable for silver knives, forks and spoons. *Pettigrew v. Barnum*, 11 Md. 434.

An action brought against an innkeeper, for the loss of goods intrusted to him by a guest, who is a servant of the owner, may be brought in the name of the owner. And one who hires the goods is for this purpose the servant of the owner. *Mason v. Thompson*, 9 Pick. 280.

So if the agent of a corporation, en-

gaged in their business, becomes the guest of an innkeeper, and is robbed of money delivered to him by his principals, to be expended in their behalf, the innkeeper is liable to the corporation. *Berkshire, &c. v. Proctor*, 7 Cush. 417.

So where a father delivered to his son, a minor, money to pay his travelling expenses on his way to college, and his expenses while there, and the son, on his way, stopped at a public inn, where the money was stolen; a suit may be brought in the father's name. *Epps v. Hinds*, 27 Miss. 657.

If a partner, being a guest at an inn, loses goods of the firm, the firm may maintain an action therefor. *Needles v. Howard*, 1 E. D. Smith, 54.

(a) Trover does not lie against an innkeeper, for the mere loss of a parcel left at the inn for the purpose of conveyance by a carrier. *Williams v. Gessey*, 5 Scott, 56, 57; 3 Bing. N. R. 849.

nor liable as such; and he is responsible only for negligence in respect to property of travellers intrusted to his care.¹ A *restaurant* is not an inn.² But a hotel in a city which receives transient guests is a common inn.³ So a man had a house on the high road, much visited by travellers, who were uniformly entertained and charged. These facts were notorious, and relied on by travellers. On the other hand, he often declared that he did not keep an inn, refused to take boarders, and often entertained his friends and countrymen free of charge. Held, though he lived in a partly settled country, on this evidence the jury might find him an innkeeper.⁴ And if a person puts up his horse at an inn, it makes him a guest, and the relation extends to all his goods left at the inn by his taking a room, and taking some of his meals at the inn, and lodging there a portion of the time. He need not take all his meals or lodge every night there.⁵ So purchasing liquor at an inn is sufficient to constitute the purchaser a guest.⁶ So where a guest goes away for a short time, leaving his property, and intending to return, he continues a guest; and the innkeeper is liable for his property, if lost during his absence.⁷ But the liability as an innkeeper ceases, when the guest pays his bill, and leaves the house with the declared intention of not returning. If he leaves his baggage behind him, the innkeeper is no longer responsible for its safe keeping, unless it is specially committed to his charge, and then only as a common bailee.⁸ So an innkeeper is not liable as such for property left by a guest who does not intend to return, though by a distinct contract he has agreed to board the guest's horse after his departure.⁹ As to the distinction between a guest and a *boarder*; although in general the contract with the former is *implied*, and with the latter *express*, yet if a traveller who puts up at an inn, and is received there as a guest, makes an agreement with the innkeeper for the price of his board by the week, he does not thereby cease to be a guest and become a boarder.¹⁰ But an innkeeper is not liable for the clothing of a boarder, which may be stolen from the boarder's room,

¹ Lyon v. Smith, 1 Morris, 184.

² Carpenter v. Taylor, 1 Hilt. 193.

³ Taylor v. Monnot, 4 Duer, 116.

⁴ Howth v. Franklin, 20 Tex. 798.

⁵ McDaniels v. Robinson, 26 Verm. 316.

⁶ 5 Barb. 560.

⁷ M'Donald v. Edgerton, 5 Barb. 560.

⁸ Wintermute v. Clark, 5 Sandf. 242.

⁹ McDaniels v. Robinson, 2 Wms. 387.

¹⁰ Berkshire, &c. v. Proctor, 7 Cush. 417; Willard v. Reinhardt, 2 E. D. Smith 148.

without the innkeeper's fault, although he would be for that of a guest.¹ (a)

§ 4. An innkeeper's responsibility extends to the care of *animals*. If a person commits his horse to an innkeeper, to be fed, he is a guest, although he do not himself lodge or receive any refreshment at the inn.² So if an innkeeper, being also a keeper of a livery-stable, receives a horse to be fed, without giving notice that he receives it as keeper of the stable, he will be answerable as innkeeper.³ So if a horse, chaise, and harness are delivered to an innkeeper, and he receives no separate compensation for keeping the chaise and harness, he is nevertheless liable for the loss of them.⁴ (b) But where one left his horse in the barn of an inn, to be cared for by the innkeeper, but himself made no proposition to become a guest, but ate, drank, lodged, and was provided for at

¹ Manning v. Wells, 9 Humph. 746.

² Mason v. Thompson, 9 Pick. 280.

³ Mason v. Thompson, 9 Pick. 280.

⁴ Ibid.

(a) Declaration, that the plaintiff had become a guest in the boarding-house of the defendant, upon the terms, amongst others, that the defendant would take due and reasonable care of the goods of the plaintiff whilst they were in the house of the defendant, for hire and reward, and it then became the duty of the defendant, by herself and servants, to take such care of the plaintiff's goods whilst a guest in the defendant's house. Breach of the alleged duty, and a loss of the plaintiff's goods, by the neglect of the defendant and her servants. It appeared that the plaintiff had been received as a guest in the defendant's boarding-house, at a weekly payment, upon the terms of being provided with board and lodging and attendance. The plaintiff, being about to leave the house, sent one of the defendant's servants to purchase some biscuits, and he left the front door ajar, and, whilst he was absent on the errand, a thief entered the house, and stole a box of the plaintiff's from the hall. The Judge directed the jury, that the defendant was not bound to take more care of the house, and the things in it, than a prudent owner would take, and that she was not liable, if there were no negligence on her part in hiring and keeping the servant; and he left it to the jury to say, whether, supposing the loss to have been occasioned by the negligence of the servant in leaving the door ajar, there was any negligence on the part of the defendant in hiring or keeping the servant. Held, by the Court, that at least it was the duty of the defendant to

take such care of her house, and the things of her guests in it, as every prudent householder would take. By Lord Campbell, C. J., and Coleridge, J., that she was bound not merely to be careful in the choice of her servants, but absolutely to supply the plaintiff with certain things, and to take due and reasonable care of her goods; and that, if there had been a want of such care as regarded the plaintiff's box, it was immaterial whether the negligent act was that of the defendant or her servant, though every care had been taken by the defendant in employing such servant; and, consequently, that the direction of the Judge was not correct. But by Wightman, J., and Erle, J., that the duty of the defendant did not require that she should do more than take all requisite care to employ and keep none but trustworthy servants; and that, if that had been done, the defendant was not liable for the single act of negligence on the part of the servant in leaving the door open; and, therefore, that the direction at the trial was right. Dansey v. Richardson, 25 Eng. L. & Eq. 76.

(b) An innkeeper agreed with the owner of a horse, to entertain the man having charge of him one day each week, or often, if he should stop there with the horse, furnish him provender, and allow him to be kept in a certain stall. None but the man having charge of the horse took care of him. The horse was injured in the stall. Held, the innkeeper was answerable. Washburn v. Jones, 14 Barb 193.

a different place; held, the innkeeper was under no liability, as such, for the horse, but only as a bailee.¹ An innkeeper may, by special arrangement, receive property as bailee, and only the liability of a bailee will then attach to him; though the *onus probandi* that he took it in such character, and not as an innkeeper, would perhaps be thrown upon him.² And though an innkeeper is *prima facie* liable for animals belonging to a guest, he is not liable for a horse kept in a lot by special agreement;³ and he may discharge himself by showing proper care and attention on his part.⁴ (a)

4 a. To render an innkeeper liable, it is not necessary that the baggage should be in his special keeping; it is generally sufficient, that it is in the inn, under his implied care. He may be exonerated, by showing that the guest has taken upon himself exclusively the custody of his own goods; but not by his request that they shall remain in some particular place in the inn, not in his exclusive possession, but under the control and supervision of the innkeeper. Unless the innkeeper has given his guest notice, that he will not be responsible for the goods if they are left in the public room, his liability still continues.⁵ It is held that the innkeeper will be liable for the necessary baggage of the traveller, his watch and personal apparel, and for money which he has about him for his personal use when stolen, notwithstanding a regulation of the inn, requiring travellers to deposit certain articles of value in the safe at the office; though not for those not immediately requisite to his comfort.⁶

¹ Ingalsbee v. Wood, 36 Barb. 452.

² Ibid.

³ Neal v. Wilcox, 4 Jones, 146; 3 Barb. 452.

⁴ Metcalf v. Hess, 14 Ill. 129.

⁵ Packard v. Northcraft, 2 Met. (Ky.) 439.

⁶ Pope v. Hall, 14 La. An. 324; Profflet v. Hall, ib. 524.

(a) The horse of a guest in a common inn was stabled with another horse, and kicked and injured by it. Held, though these facts raised a presumption of negligence, the innkeeper might in defence show due care. Dawson v. Cholmeley, 1 Dav. & Mer. 348.

The defendant, an innkeeper, took the plaintiff's horse to keep. The plaintiff rode out the horse one evening, and, on returning to the stable, tied him to the stall where he had been previously kept. The next morning the horse was found dead in the same stall, with his head fast in the trough. The trough was made of a hollow beach log, having a bulge in the middle, which rendered that part of the trough wider than

it was at the top. The horse had got his head fast in the trough by the jaws, and, as the witnesses supposed, had killed himself in the attempt to draw it out. Held, the plaintiff was not entitled to recover. Thickstun v. Howard, 8 Blackf. 535.

In case against an innkeeper, to recover the value of a horse choked to death by his halter in the defendant's stable; the defendant proved, that the horse had been secured in the stall under the superintendence and direction of the plaintiff; and in reply the plaintiff proved the very bad condition of the stall. Held, the defendant was not entitled to rejoin, in evidence. Jordan v. Boone, 5 Rich. 528.

§ 5. An innkeeper is not liable for the loss of goods, if the plaintiff was guilty of gross negligence.¹ And it is held that gross negligence need not be shown, but only that the guest has by his own neglect or imprudence exposed his goods to peril.² (a) Thus where the plaintiff had, on the evening of the night in which the theft was committed, and on several previous occasions, opened his driving box, and counted the bank-notes kept in it, in the

¹ *Armistead v. White*, 6 Eng. L. & Eq. 349.

² *Fowler v. Dorton*, 24 Barb. 384.

(a) Action for loss of a watch and money. It was proved, that the guest showed his money openly in the commercial room, went to bed, and slept with his bedroom-door open, so that a person outside could see his watch and money on the table. Late at night, a servant of the defendant, whose duty it was to sit up all night and attend to the outer door of the inn, let in a stranger, who, two hours afterwards, secretly left the inn, having stolen the watch and money. The Judge left it to the jury to say "whether the plaintiff had been guilty of gross negligence, telling them that if he had, the defendant was entitled to their verdict; but if they did not think the conduct of the plaintiff amounted to gross negligence, he was entitled to their verdict." Verdict for the plaintiff. Held, the direction was wrong; and that the goods remained under the charge of the innkeeper, and under the protection of the inn, so as to make him liable as for breach of duty, unless the negligence of the guest occasioned the loss, in such a way as that it would not have happened, if the guest had used the ordinary care that a prudent man might be reasonably expected to have taken under the circumstances. *Cashill v. Wright*, 37 Eng. L. & Eq. 175.

Where a traveller directed that his trunk, which contained money, should be carried to the room into which the innkeeper had shown him to sleep for the night, and in the night the trunk was broken open and the money stolen; held, the traveller having only conformed to the general custom, the innkeeper was liable. *Eppe v. Hinds*, 27 Miss. 657.

Travellers are not bound to deposit their money in a safe at an inn, although they may know one is provided for that purpose. *Johnson v. Richardson*, 17 Ill. 302.

A statute of New York provides that an innkeeper shall not be liable for the loss of valuable articles, if notice is posted in the

rooms, that a safe is provided for them. And it was held that actual notice, by analogy, would sustain the same defence. *Purvis v. Coleman*, 1 Bosw. 322; 21 N. Y. (7 Smith) 111.

Held, also, that, after actual notice, leaving \$2,000, in gold, in a room in a New York hotel, was such negligence, as to exonerate the hotel-keeper, independently of any statute. *Ib.*

Where a guest, in compliance with a general notice, delivered to the clerk, to be deposited in a safe, a sealed package, and, in reply to an inquiry concerning the contents, said "money;" held, the innkeeper was liable for a loss, only to the amount of reasonable travelling expenses. *Wilkins v. Earle*, Ann. Law Reg. Oct. 1865, p. 742, New York. (Containing an elaborate and learned view of the general subject, more especially a citation of the most ancient reports and abridgments).

The New York act of 1856, c. 421, was intended to exempt hotel-keepers from liability as to certain property or goods therein specified, in certain cases, and not to affect the principle or policy upon which their liability was established, or the nature of the contract or duty upon which it was enforced, at common law. *Gile v. Libby*, 36 Barb. 70.

A watch, pencil-case, and \$25.00 in money, lost by a guest in a hotel, are not, it seems, *baggage*, within the meaning of the act of 1855, c. 421, § 2. *Ib.*

A traveller was put into a room in a hotel with a fellow-lodger, contrary to his remonstrances expressed to the servant, and his watch, money, &c., were stolen under circumstances rendering it extremely probable that the fellow-lodger took them. Held, that under the act of 1853, c. 421, § 2, the innkeeper would not be protected on account of failure of the loser to lock and bolt his door, since such precaution could not probably have prevented the loss. *Ib.*

presence of persons in the commercial room; and the box was so insecurely fastened that it might be opened without a key: held, the jury were warranted in finding the plaintiff guilty of gross negligence; though it was the custom of travellers to leave their driving-boxes in the commercial room during the night.¹ So, in an action against an innkeeper for money contained in a valise; if, in concealing the fact that the valise contained money, and treating it as mere baggage, the plaintiff was guilty of gross negligence; the defendant is not liable.² So, if a boarder at a hotel fails to take such care of his watch as a person of ordinary prudence should take, the landlord will not be responsible for its loss.³ So an innkeeper is not answerable for the goods of his guest, which are lost, through the negligence of the guest, out of a private room in the inn, chosen by the guest for the purpose of exhibiting to his customers his goods for sale, the use of which room was granted by the innkeeper, who at the time informed the guest that there was a key, and that he might lock the door, which he neglected to do.⁴ But a guest is not bound to keep his room locked at all times, to entitle him to recover for a robbery.⁵

§ 6. Where property is so deposited with an innkeeper, that he has a lien upon it for the keeping, he is also liable for its loss; where he has no such lien, he is not so liable. The lien and the liability stand and fall together.⁶ An innkeeper has a lien on baggage.⁷ And it is held, that an innkeeper may detain a horse brought by his guest, for his keep, against the owner of the horse; and need not show that he received them of a guest.⁸ So an innkeeper's lien extends to goods brought to his inn by a guest, though they belong to a third party, provided they are such as a person might ordinarily travel with.⁹ (a) But where several persons travel together and put up together at an inn, the goods of one,

¹ 6 Eng. L. & Eq. 349.

² Fowler v. Dorlon, 24 Barb. 384.

³ Chamberlain v. Masterson, 26 Ala. 371.

⁴ Burgess v. Clements, 4 M. & S. 306.

⁵ Buddenburg v. Benner, 1 Hilt. 84.

⁶ Ingalsbee v. Wood, 36 Barb. 452.

⁷ Willard v. Reinhardt, 2 E. D. Smith, 148.

⁸ Yorke v. Grenaugh, 2 Ld. Ray. 867.

⁹ Snead v. Watkins, 37 Eng. & L. & Eq. 384.

(a) A, who had formerly been clerk to the plaintiff, an attorney, was subpoenaed as a witness in an action brought by the plaintiff for a bill of costs. A put up at a public house, kept by the defendant, bringing with him a bag, containing, amongst

other things, a letter-book belonging to the plaintiff, and quitted without paying his bill, leaving the bag behind him. Held, the defendant had a lien upon the property.

37 Eng. L. & Eq. 384; 19 Com. B. 267.

cannot be detained for the board of all.¹ (a) And an innkeeper cannot detain the goods of a boarder.² (b)

¹ Clayton v. Butterfield, 10 Rich. Law, 300.

² Ewart v. Stark, 8 Ib. 423; Hursh v. Byers, 29 Mis. 469.

(a) A father and his two daughters put up at an inn. The board of all was charged to the father, and he was sued for it, and, being held to bail, took the benefit of the insolvent debtor's act. Held, the landlord had no lien on the trunk of one of the daughters and its contents for the whole board due to him. 10 Rich. 300.

(b) It is held, that a *livery-stable keeper* has no lien, either for the keep of a horse standing at livery, or for money paid by him, at the request of the owner, for the attendance of a veterinary surgeon upon the horse. Orchard v. Rackstraw, 2 Com. B. 698.

CHAPTER XLVI.

BAILEMENT. — COMMON CARRIERS.

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|---|---|
| 1. Common carriers, who are. | 19. Notice, as affecting liability. |
| 7. Burden of proof. | 26. Custom or usage. |
| 8. To whom liable. | 27. Passenger-carriers. |
| 10. Delivery to. | 28. Liability for baggage. |
| 11. Delivery by. | 30. Injury caused by the passenger's own fault. |
| 12. Nature of liability; exception of the act of God, &c. | 32. <i>Ferries</i> . |
| 18. Form of action against — <i>trover</i> . | 33. Lien. |

§ 1. ANOTHER form of bailment is that termed *locatio operis mercium vehendarum*; involving the important subject of the rights, duties, and liabilities of *common carriers*. (a)

§ 1 a. To make a person a common carrier, he must exercise the business as a public employment for hire, not as a casual occupation, *pro hac vice*; he must undertake to carry goods for persons generally, or all who choose to employ him, though it need not be his *usual* occupation.¹ A person whose business is not the carrying of goods, and who does not hold himself out to the world as such, will not be regarded as a common carrier, although he may occasionally carry goods for hire; and, in case of loss, will be responsible only as an ordinary bailee.² But, it is held, if one contracts specially to carry goods to a particular place, and deliver them in "good order and condition, unavoidable accidents only excepted," he is liable as a common carrier, although not one. And even though not to be paid therefor.³ And where persons receive goods as carriers, and give a receipt and bill of lading, it is not competent for them to show, by parol testimony, that they

¹ *Fish v. Chapman*, 2 Kelly, 349; 18 Tex. 498; *Gisbourn v. Hurst*, 1 Salk. 250; *Russell v. Livingston*, 19 Barb. 346. See *Mershon v. Hobensack*, 2 Zab. 372; *Campbell v. Perkins*, 4 Seld. 430.

² *Samms v. Stewart*, 20 Ohio, 69; *Shaw v. Davis*, 7 Mich. 318.

³ *Coggs v. Bernard*, 2 Ld. Ray. 909; 1 Com. 133; 2 Kelly, 349.

(a) See *Russ v. Steamboat*, 14 Iowa, 363. The liability of a common carrier as for a tort, rather than a contract, is well illustrated by the decision, that an action

may be maintained against him, though the contract was made on *Sunday*. *Menitt v. Earle*, 29 N. Y. (2 Tiff.) 115.

are not common carriers, for the entire distance stated in the bill of lading.¹ So package express companies, which transport goods for hire, by a conveyance not their own, are, nevertheless, not forwarders, but common carriers.² Or parties doing business under the name of the *Western Transportation Company*, advertising for patronage, receiving goods, and forwarding them to western places for hire, as an equivalent for the entire service; although they employ the conveyances of third parties only.³ And one, who holds himself forth to the public to carry for hire, is a common carrier as much in his first trip as in his second, third, or fourth.⁴ (a) So a common carrier, from a place within to a place

¹ *Chouteaux v. Leech*, 18 Penn. 224.

² *Place v. Union, &c.* 2 Hilt. 19.

³ *Mercantile, &c. v. Chase*, 1 E.D. Smith,

115. See *Krender v. Woolcott*, 1 Hilt. 223.

⁴ *Fuller v. Bradley*, 25 Penn. 120.

(a) Where the master of a vessel, engaged chiefly in carrying naval stores between a port in North Carolina and the city of New York, took in charge a box of jewelry, without including it in a bill of lading, and without any contract as to the price for carrying it; held, he was only liable as an ordinary bailee, and not as a common carrier, and, having kept it in his cabin, locked up in his chest, and having been violently robbed of the property, with his own, in the night-time, he was not guilty of negligence, and not liable for the value of it; that the nature of this bailment did not bind the defendant to a direct voyage from the one port to the other, so as to subject him for a deviation. *Pender v. Robbins*, 6 Jones, 207.

Proof of the usage of the clerks of steamboats, to receive and carry packages from one port to another, without hire, in the expectation that such boat would be preferred by the parties in their shipments of freight, is insufficient to bind the owners: first, because no certain or fixed standard of remuneration is shown, nor that the consignee of the package would be liable to make any return for the risk and labor incurred; and, second, because it is not shown that such usage had grown up with the consent of the owners of vessels, or that it was more than a mere accommodation usage. *Cincinnati, &c. v. Boal*, 15 Ind. 345.

The uncontradicted testimony of a witness, that he had done business with the defendants for about nine or ten years, and that "they did business as common carriers with all that called," establishes, *prima facie*, that they are common carriers. *Haslam v. Adams, &c.* 6 Bosw. 235.

Where a farmer assumes the business of a carrier at certain seasons of the year, he does not necessarily incur the responsibilities of a common carrier, as to all contracts for the transportation of goods made at other seasons and under special circumstances.

It is for the jury, in such case, under the direction of the court, to find whether he is a carrier or not. *Haynie v. Baylor*, 18 Tex. 498.

The defendants, whose usual business was farming, during the season of hauling, employed a team in transporting goods between two places. The plaintiff delivered to them a quantity of cotton to be transported; and, while on the way, some of the ropes broke and the bales burst, and, on one night, the wagon with the cotton was placed within fifteen feet of the camp-fire, which was renewed at midnight, but at both times there was no wind. In the morning the cotton was found to be on fire, the wind having arisen and blown the fire upon the cotton. Held, that the defendants were liable as common carriers for the loss of the cotton. *Chevalier v. Straham*, 1 Tex. 115.

The keeper of a public house, in the neighborhood of a railroad station, having given public notice that he would furnish a free conveyance to and from the cars to all passengers, with their baggage, travelling thereby, who should come to his house as guests, and for this purpose having employed the proprietors of certain carriages to take all such passengers, free of charge, to them, and to convey them and their baggage to his house; if a traveller by the cars, to whom this arrangement is known, employ one of the carriages thus provided

without the realm, is subject to the same liabilities as one who carries only within the realm.¹

§ 2. So *railroad corporations* are common carriers; and very many of the cases, relating to the various points connected with this general subject, are actions brought against such corporations. It is held that they are estopped by their charters to deny this

¹ *Crouch v. London*, &c. 25 Eng. L. & Eq. 287.

to take him and his baggage to such public house, and his baggage is lost or stolen on the way, through a want of due care or skill on the part of the proprietor of the carriage or his driver; the keeper of the house will be liable therefor. *Dickinson v. Winchester*, 4 Cush. 114.

The owner of a *toll-bridge* is not a common carrier. *Grigsby v. Chappell*, 5 Rich. 443.

Mere notice will not change a common into a private carrier. *Kimball v. Rutland*, &c., 26 Verm. 247.

It is a question of law. *Ibid.*

Where the declaration in an action against a railroad corporation, for a personal injury to one of the plaintiffs, after stating that the defendants were the owners of a certain railroad, running through the towns of W. and P., and of certain cars for the conveyance of passengers upon that road, averred, that, on the day specified, the defendants were the owners of, and were running and propelling, upon said road, a certain train of passenger cars, for a certain reasonable reward paid to the defendants; it was held, that it sufficiently appeared from the declaration, that the defendants were common carriers; and that it was not necessary to allege that the defendants had power by their charter to become carriers; for, being engaged in this business, and having, in its pursuit, made a contract pertaining to it, they ought not to be allowed to say to the contracting party, that they had no power to do so. *Fuller v. Naugatuck*, &c. 21 Conn. 557.

A, the keeper of a coach-office, and a part owner in several coaches, made a contract with B, for the carriage of parcels which he was in the habit of sending from the office to various places. Held, this bound the owners of all the coaches in which A was a part owner; as well those who became partners after the making of the contract, as those who were so before. *Helsby v. Mears*, 5 B. & C. 504.

Hoymen, ferrymen, and masters of ships, who carry goods for hire, are common carriers. *Mors v. Sluce*, 1 Mod. 85; *Griffith v. Cane*, 22 Cal. 534.

A public ferryman is a common carrier; and a private ferryman, not on a public road, may yet incur the liabilities of a common carrier, by notoriously undertaking to transport, for hire, all persons indifferently, with their carriages and goods. *Hall v. Renfro*, 3 Met. (Ky.), 51. See § 32.

If horses start and run overboard, while on a ferry-boat, which has not sufficient barriers, the ferryman is *primâ facie* liable, as he is a common carrier, and the horses are in his possession; it is upon him to show that the loss arose from inevitable accident, &c., or that the driver expressly or impliedly undertook to keep them safely. *Powell v. Mills*, 37 Miss. 691.

Where the driver left the coach-box, tying the reins to it, and proceeded to water the horses, and was carried into the river by them; held, he did not undertake to keep them, and was probably carried overboard, not in the performance of such a duty, but in the effort to aid the ferryman in performing his duty. *Ibid.*

Held, the accident did not happen from any "natural infirmity" in the property carried; that this phrase applies only to articles liable to decay, evaporation, &c., or to articles improperly packed, which are liable to injury without any fault of the carrier; that by proper care, as by erecting suitable barriers, the carrier could convey horses safely. *Ibid.*

Held, that it was error to instruct the jury, that, if the accident was caused by the negligence of the plaintiff or his driver, he could not recover, as there was no proof of negligence. *Ibid.*

Held, that an instruction that the defendants were not liable, if the jury believe that there was no intention to trust them with the property whilst in the boat, and that the plaintiffs were in the habit of placing their own drivers on the boat by whom the coach was exclusively managed and controlled, was likewise bad, as leaving it to the jury to draw, from the fact that the driver had the general control, the unwarrantable presumption that he thereby assumed all control and responsibility. *Ibid.*

liability.¹ And a private arrangement between a railroad company and an expressman does not relieve it from its liability as a common carrier.² (a) So the owners and master of a *ship* are liable as common carriers, except so far as their liability is limited by the bill of lading or charter-party, and by statute.³ Thus the owners of a steamboat, employed in carrying goods for hire between Charleston and Columbia, in South Carolina, are common carriers.⁴ So the master of a steamboat, plying on a navigable river, is presumed to be a common carrier; and, in an action against him as such, the burden is on the defendant to show the contrary, although the declaration only alleges that the defendant is master of a certain steamboat, without alleging that he is a common carrier.⁵ And the owners of a steamboat are liable for bank-bills, sent in a letter, intrusted to the captain, and not delivered by him, although no compensation for carrying is agreed upon; unless the party sending the bills knew that the captain was exceeding his powers in taking them.⁶ (b) But a steamboat is

¹ *Virginia, &c. v. Sanger*, 15 Gratt. 230; *Parker v. Great*, &c. 7 M. & Gr. 253; *Jones v. Western*, &c. 1 Wms. 399; *Fuller v. Naugatuck*, &c. 21 Conn. 557, 570; *Redf. on Railw.* p. 235, § 125; *Mal-lory v. Tioga*, &c. 39 Barb. 488.

² *Langworthy v. New York*, &c. 2 E. D. Smith, 195.

³ *Brown v. Clayton*, 12 Geo. 564.

⁴ *Swindler v. Hilliard*, 2 Rich. 286.

⁵ *Bennett v. Filyaw*, 1 Branch, 403.

⁶ *Chouteau v. Steamboat*, &c. 11 Mis. 226.

(a) If a railroad company loan some of its cars to an individual, who loads them himself and in his own way, the company is not liable as a common carrier, for any injury to the property in such cars, arising from imperfect loading. *East Tennessee, &c. v. Whittle*, 27 Geo. 535.

Parol evidence, that a railroad corporation established by law in another State has held itself out, through its agents, as a common carrier over a railroad in Massachusetts, is sufficient *prima facie* evidence of its capacity to contract for such carriage, to maintain an action against it for the loss of merchandise intrusted to it. *McCluer v. Manchester*, &c. 13 Gray, 124.

A railroad corporation, which has leased a portion of another railroad, connecting with its own, is not exempted from liability to the owner of goods delivered to it at a depot on the portion so leased, by an agreement with the proprietors of that road, by which the two corporations upon their respective roads mutually agree to furnish suitable depot accommodations, and receive and deliver freights, and that the liability of the first corporation for upward freight

upon the road of the second shall not commence until delivery on the cars of the first. *Ibid.*

A railroad corporation cannot dispute their liability for freight delivered to them to be carried over a railroad leased to them, on the ground that the lease is void. *Ibid.*

(b) The defendants, a corporation, were common carriers upon Lake Champlain, and their charter extended to the carrying of all goods, wares, and merchandise, and "all other articles and things usually transported by water" on that lake. Bank-bills were usually carried by the water-craft upon that lake, at the time the corporation received their charter and went into operation. Held, the defendants' powers, as a corporation, extended to the carrying of bank-bills, though the charter did not of necessity constitute them common carriers of bank-bills, so as to preclude them from the right of declining to carry them. And it is not necessary, in such case, to show, by positive proof, that the company consented that the captain of their boat should carry money on their account. The captain is the general agent of the owners;

not liable as a common carrier, unless the carriage of the goods was undertaken for hire.¹ And the owners of a steamboat employed to tow other boats and rafts are not common carriers.²

§ 3. A *ferryman* is a common carrier;³ if holding himself out for general employment.⁴ See § 32, p. 539, n.

§ 4. It is held, that the law of common carriers is strictly applicable to *express companies*.⁵ But, on the other hand, it is held, that expressmen, who forward goods from place to place for hire, in conveyances owned by others, are not liable as common carriers, but as bailees for hire to forward goods by the ordinary modes of

¹ Chouteau v. Steamboat, &c. 16 Mis. 216.

² Leonard v. Hendrickson, 18 Penn. 40; Wells v. Steam, &c. 2 Comst. 204; Abbey v. Stevens, 22 How. (N. Y.) 78.

³ Smith v. Seward, 3 Barr. 342.

⁴ Wilson v. Hamilton, 4 Ohio, 722.

⁵ Stadhecker v. Combs, 9 Rich. 193.

and *prima facie* they are liable for all contracts for carrying, made by the captain or other general agent, for that purpose, within the powers of the owners themselves; and the burden rests upon them to show, that the plaintiffs had made a private contract with the captain, which it was understood should be kept from the knowledge of the defendants, or else had given credit exclusively to the captain. The mere fact, that the captain was by the company permitted to take the perquisites for carrying such parcels, will not exonerate the company. But it is not competent for the plaintiff, in order to charge the company, to prove by his agent, who delivered the package to the captain, that he intended to intrust the money to the captain in his official, and not in his private capacity, — without evidence that this was in some way made apparent at the time. *Farmers', &c. v. Champlain, &c.* 23 Verm. 186. See 16 Mis. 216.

The owners of a tow boat, undertaking to tow another boat, are, in the absence of an express contract limiting their liability, bound to exercise ordinary care and diligence. When A, a carrier of goods, employs a tow-boat to tow his vessel, and those in charge of the tow-boat are guilty of negligence, whereby damage is done to the goods; and A has not excepted in his contract such risks; he is liable to the owners of the goods, as for the acts and neglects of his agents. Hence he may maintain an action against B, the proprietor of the tow-boat. In such an action B cannot claim any deduction for so much of the loss as was covered by insurance. *Merrick v. Brainard*, 28 Barb. 574. See *Ashmore v. Pennsylvania, &c.* 4 Dutch. 180.

The master of a canal boat, laden with merchandise, being in the city of New York, obtained from the defendants, who

had been engaged for several years in towing vessels upon the Hudson River by means of steamboats, a permit in the following words: "Captain A, of steamboat B, take in tow for Albany canal boat C, &c. at the risk of the master and owners thereof, and collect \$30." The permit was delivered to Captain A, who accordingly took the canal boat in tow, the master and hands remaining on board in charge of the boat and her cargo; and, while proceeding up the river in the night time, she was run upon a rock, and, with her cargo, was lost. In an action for the loss, on the ground of unskillfulness or want of care in the navigation; held, whether the defendants were common carriers of the canal boat and her cargo, or not, they were liable for gross neglect. *Alexander v. Greene*, 7 Hill, 533.

The defendant contracted with the plaintiff, to forward certain goods from New York to Ohio by steam; the defendant being owner of a line of boats on the canal, though he owned none on Lake Erie. The goods were sent on the lake by a sailing vessel, and were lost. Held, the defendant was liable for the whole route as a common carrier. *Wilcox v. Parmelee*, 3 Sandf. 610.

The master of a steamboat contracted with the plaintiff, to transport merchandise from A to B, within a reasonable time after its delivery at A. Owing to a fall of the river Missouri, the master could not navigate it with his own boat for two months, during which time merchandise was delivered at A. The river, in the mean time, was navigable by smaller boats. Held, the master was not excused for delaying to transport the merchandise, until the river was navigable by his own boat. *Collier v. Swinney*, 16 Mis. 484.

conveyance, and have a legal right to define the extent of their liability.¹ (a)

§ 5. It is not necessary, to constitute one a common carrier, that a stipulation should be entered into as to the amount of freight. But there must be a right to compensation, though without this there may be the responsibility of a *mandatary*.² Thus a hackney-coachman is not liable for the loss of goods, for the carriage of which he is not paid.³ (b)

§ 6. A common carrier is required by law to perform the duty which he assumes, and is liable for any damage resulting from a refusal to perform it. He has no general right to refuse to receive a parcel tendered to him for conveyance, unless informed of the nature of its contents. Thus a railway company acting as common carriers, and bound by statute to deal equally with all persons, cannot make a regulation for the conveyance of goods, which in practice affects one individual only.⁴ And a railroad is bound to furnish reasonable and ordinary facilities for transportation, though not to provide in advance for extraordinary occasions, or an unusual influx of freight.⁵ So it is held, in an early case, that an action lies against

¹ *Hersfield v. Adams*, 19 Barb. 577.

² *Knox v. Rives*, 14 Ala. 249.

³ *Upshare v. Aldee*, 1 Com. 24.

⁴ *Crouch v. London, &c.* 25 Eng. L. & Eq. 287; 14 Com. B. 255; 18 Ill. 488.

⁵ *Galena, &c. v. Rae*, 18 Ill. 488.

(a) Where expressmen, engaged in forwarding goods to California by others' boats and vessels, received two trunks of goods to be transported, contracting to be liable for no loss except from the fraud or gross negligence of them or their agents or servants, and the goods were injured by the sinking of a boat in the Chagres River, and examined by surveyors and sold at auction; held, the expressmen were not liable for damages previous to the sinking of the boat, and were not guilty of gross negligence in not forwarding the damaged goods to California, the captain of the boat, as common carrier, having control of the goods when in his possession; and that the expressmen were only liable for the amount the goods sold for, the advanced freight and interest. 19 Barb. 577.

The owners of goods, delivered to an express and forwarding line, are bound by any contract in force between the forwarders and the common carriers whom they employ. They therefore cannot maintain any action against such carriers, except what could have been maintained by the forwarders. *Stoddard v. Long Island, &c.* 5 Sandf. 180.

(b) Gold dust was taken on board the

steamer *New World*, to be carried gratuitously from Sacramento to San Francisco, the clerk of the boat having given the owners of the dust actual notice, that he would receive gold dust or money only on condition that no charge should be made and no responsibility incurred. The gold dust was stolen from the boat, without any negligence on the part of its officers. Held, the owners were not liable. *Fay v. Steamer, &c.* 1 Cal. 348.

In an action by the consignor of goods against a carrier for non-delivery, if the plaintiff aver that the defendant undertook to deliver, &c., in consideration of the hire to be paid by the plaintiff, proof that the hire was to be paid by the consignee is no variance; the consignor being by law liable. *Moore v. Wilson*, 1 T. R. 659.

The consignee of goods, who is ready to pay freight on having the goods delivered to him, may, without any tender, maintain trover against the carriers or their agents, who, having no legal claim on the goods for anything besides the freight, refuse to deliver them, unless a further sum is first paid. *Adams v. Clark*, 9 Cush. 215.

a common carrier for refusing to carry money, if he do not assign a particular reason for it.¹ So one who holds himself out as a carrier of goods between two places, one of which is beyond the confines of England, is still subject to the common-law liability of a carrier for hire, and is bound to accept all goods which are reasonably tendered to him for conveyance between those limits.² The plaintiff must prove a tender of, or readiness to pay, freight.³ (a) Slight evidence, however, is sufficient. And it may be presumed from surrounding circumstances. And pre-payment is not necessary, unless required.

§ 7. In an action against a common carrier for loss of goods, it is necessary to prove that he was a common carrier, as well as that the goods were not delivered.⁴ Also the condition of the goods, either directly or presumptively, when delivered.⁵ And the receipt is not conclusive as to their condition.⁶ But proof of delivery of goods to a common carrier, and of a demand and refusal of the goods, or of such loss of goods as rendered a demand useless, throws the burden of proof on the carrier, to show delivery, or that the loss of goods happened by dangers for which he is not liable.⁷ (b)

§ 8. It is held that the action against a carrier for loss of goods must be brought by the *owner*.⁸ The consignee may maintain an action, especially where there is no evidence of ownership in the consignor.⁹ And it is no answer, that the goods were delivered to

¹ 12 Mod. 3; *Lane v. Cotton*, 1b. 472.

² 14 Com. B. 255; *Galena, &c. v. Rae*, 18 Ill. 488.

³ *Galena, &c. v. Rae*, 18 Ill. 488.

⁴ *Ringgold v. Haven*, 1 Cal. 108.

⁵ *Smith v. N. Y. &c.* 43 Barb. 225.

⁶ *Tarbox v. Eastern, &c.* 50 Maine, 339.

⁷ *Emm v. Johnson, Sprague*, 527;

Western, &c. v. Newhall, 24 Ill. 466; *Tarbox v. Eastern, &c.* 50 Maine, 339; *Alden v. Pearson*, 3 Gray, 342. But see *Williams v. Holland*, 22 How. (N. Y.), 137. See, also, *Tardos v. Tonlon*, 14 La. An. 429.

⁸ 2 E. D. Smith, 317. See *Patterson v. Moore*, 34 Penn. 69.

⁹ *Arbuckle v. Thompson*, 37 Penn. 170.

(a) In declaring against a common carrier of passengers for refusing to carry, there must be an averment that the plaintiff offered, or was ready and willing, to pay the fare. *Day v. Owen*, 5 Mich. 520.

(b) In an action by the consignor of goods against the proprietor of a general booking-office for the transmission of parcels by coach, &c., charging negligence, whereby the consignor lost his goods; it is not sufficient to prove that they never reached their destination or were never accounted for. The office-keeper's duty is to deliver to a carrier, and some evidence must be given, showing specifically a breach

of that duty. *Gilbart v. Dale*, 5 Ad. & Ell. 543.

But where, in case against a carrier, for the loss of goods delivered to him at Dublin, to be conveyed to Liverpool, it was objected for the defendant, that, unless the goods were proved to be duly entered at the custom-house, the importation was illegal, and the contract with the carrier void; held, that illegality is never to be presumed, and that the defendant, in order to raise the objection, was bound to prove that the goods were not entered. *Sissons v. Dixon*, 5 B. & C. 758.

the defendants by A, who, as consignor, claimed compensation for the loss, and that the defendant paid him, as such consignor, without notice that he was the agent of the plaintiff, and believing that he delivered the goods on his own account, and was the person entitled to sue.¹ But though, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the action, yet, if the consignor make a special contract with the carrier, such contract supersedes the necessity of showing the ownership in the goods, and the consignor may maintain the action, though the goods may be the goods of the consignee. And the question, whether in fact goods were delivered to the carrier at the risk of the consignor or consignee, is a question for the jury. The delivery of goods to a carrier by a consignor does not necessarily vest the property in them in the consignee.² The legal presumption is, that the consignee is the owner.³ Thus the traveller of M, a tradesman, residing in London, verbally ordered goods for M, of the plaintiff, a manufacturer at Paisley. No order was given as to the sending the goods. The plaintiff gave them to the defendant, a carrier, directed to M, to be taken to him, and also sent an invoice by post to M, who received it. The goods having been lost by the defendant's negligence; held, the defendant was liable to the plaintiff.⁴ (a)

§ 9. A mere *bailee* of goods may maintain an action for the loss of them against a carrier. Thus a laundress sent linen, which she had washed, to the owner, by a carrier, whom she paid. The carrier having lost it; held, that the laundress was entitled to sue the carrier for the loss.⁵ (b)

¹ Coombs v. Bristol, &c. 3 Hurl. & Nor. 1.

² Dunlop v. Lambert, 6 Clark & Fin. 600; Davis v. James, 5 Burr. 2680; W. & A., &c. v. Kelly, 1 Head, 158. See Green v. Clark, 5 Denio, 497.

³ Ogden v. Coddington, 2 E. D. Smith, 317.

⁴ Coats v. Chaplin, 3 Ad. & Ell. N. S. 483 2 Gale & Dav. 552.

⁵ Freeman v. Birch, 3 Ad. & Ell. N. S. 492, n.; Moran v. Portland, &c. 35 Maine, 55; 1 Nev. & M. 420.

(a) As to a *joint* action, see Metcalfe v. London, &c. 4 C. B. N. S. 313.

(b) On the other hand, the special property of the carrier, as a bailee, is sufficient to sustain an action of *trover* brought by him against a third person. More especially, if, in consequence of non-delivery, the carrier has agreed to pay for the goods. Maine Stage Co. v. Longley, 2 Shep. 444.

In such an action, he may recover the value of the goods, which he will hold in

trust for the owner. Merrick v. Brainard, 38 Barb. 574.

So a carrier, though he have not received freight, or paid the loss, may yet recover damages from another who has caused a loss. White v. Bascom, 2 Wms. 268.

The plaintiffs, common carriers, brought to New York barrels of whiskey belonging to P, and consigned to D. & Co. In delivering a quantity of whiskey, subsequently,

§ 10. In order to charge a common carrier for the loss of property, it is necessary that it should be delivered to him, or his agent, for transportation. But such delivery may be either actual or constructive. If he agree that the property may be deposited at a particular place, without any express notice to him, such deposit amounts to constructive notice, and a sufficient delivery. And such agreement may be shown, by proof of a constant practice and usage by the carrier, thus to receive property. Thus, where goods are delivered in the usual manner, for transportation by a carrier, on his private dock, used exclusively for this purpose; such delivery renders him liable for the loss of the goods, although neither he nor his agent was otherwise notified of such delivery. And where the defence is placed solely on the ground of a want of notice to him of delivery; the Court may properly rule that the delivery, if in accordance with the usage, was sufficient, without submitting to the jury the question of fact, whether such usage influenced the plaintiff in his conduct.¹ The principle is, that, if the deposit of goods in the carrier's warehouse is a mere *accessory to the carriage*, and for the purpose of facilitating it, his liability as a common carrier begins with the receipt of the goods.² And any arrangement made between a carrier and his servant, by which the servant is to be paid for the carriage of particular parcels, will not exempt the carrier from responsibility for the loss

¹ Merriam v. Hartford, &c. 20 Conn. 354; Trowbridge v. Chapin, 23 Ib. 595.

² Clarke v. Needles, 25 Penn. 338.

to the defendants, on an order of H. & Co., they by mistake delivered them these barrels. On discovering the mistake, they demanded the whiskey of the defendants, which the defendants refused, or to pay for it. The plaintiffs paid D. & Co., as agents of P, the value of the whiskey, and took their receipt, and thereupon repeated their demand, and the defendants again refused. Held, the plaintiffs might maintain either an action of tort, for conversion, or an action for the value of the property, on an implied contract. *Hudson River, &c. v. Lounsberry*, 25 Barb. 597.

A person who, at the request of a friend upon his death-bed, promises him, in case he dies, to send his body home to be buried with his mother; and, after his death, obtains a coffin from the city, and purchases a box in which to forward it, and puts the coffin with the body into the box, and ships them on board a vessel; and pays to the owners of the vessel the price for which

they have agreed with a sister of the deceased, since his death, to carry the body, if enclosed in such a box, to the desired place, of which agreement the sister has informed him: cannot maintain an action against the owners of the vessel for neglecting so to carry, without further proving a special contract with him to do so. *Driscoll v. Nichols*, 5 Gray, 488.

"The plaintiff had no legal interest in this dead body, by reason of which he could maintain this action against a carrier without proof of a special contract with himself. And there was in our opinion no evidence in the case, which would have warranted a jury in finding such special contract. There was no agreement, or even request to carry the box without the body. The one is but the incident of the other, and cannot be severed from it. For taking it without the corpse, the defendants would have been clearly liable in trover." Per Thomas, J. Ib. 492.

of them, unless such arrangement is known to the owner thereof, so that he contracts exclusively with the servant.¹ So where a corporation have a general agent, employed for the purpose of receiving and transporting merchandise for hire, and held out to the world as invested with authority for this purpose; if goods are delivered to him, to be transported in the way of his duty, the corporation will be liable.² So goods bought in Connecticut, and delivered by the vendor on board a vessel at New York to be carried to England, were receipted for, the receipt specifying the price of freight, but, before bills of lading were executed, and before the ship sailed, she was burnt, with the goods on board, without any actual negligence of the ship-owners. Held, they were liable, as common carriers.³ But where common carriers set up to carry certain kinds of property from one given point to another, they cannot be compelled to receive such property at intermediate points; and, if an agent in their employ receives property at an intermediate point, his right so to receive it is a proper subject of inquiry in an action against his principals, for the agent's failing to deliver property so received; and it is erroneous not to admit evidence upon that point.⁴ (a) And if anything remains to be done by the consignor of goods or his agents, after their delivery to a railroad company, before they are ready for transportation, the company are only responsible for them as warehousemen.⁵ So delivery to the deck hands of a steamboat is insufficient, without proof that they were authorized to receive freight, or that the delivery was in pursuance of some contract or usage; although the manner of reception by the hands was such, that the officers, having the duty of receiving freight, must have

¹ *Mayall v. Boston*, &c. 19 N. H. 122.

⁴ *Thurman v. Wells*, 18 Barb. 500.

² *Ibid.*

⁵ *Judson v. Western*, &c. 4 Allen, 520.

³ *Lakeman v. Grinnell*, 5 Bosw. 625.

(a) See *Forbes v. Davis*, 18 Tex. 268; *Michigan, &c. v. Meyres*, 21 Ill. 627. Suit against the S. C. Railroad Co. for cotton lost. Proof, that the cotton was delivered to an interior railroad company, terminating at the interior end of the defendant's railroad, and consigned to a firm in Charleston, but no proof that it came into the possession of the defendants, nor that the two roads were joint contractors. Held, insufficient. *S. C. Railroad Co. v. Bradford*, 10 Rich. 307.

A parcel was delivered to a porter of a railway company at the station, to be for-

warded from Gloucester to London, after the way-bill and the guard's parcel-book had been made up. The parcel was placed by the porter in the usual receptacle, a locked box in the luggage van, and entered by him on the way-bill; but the fact of his having so placed it in the box was not communicated to the guard. After several intermediate stoppages, the train reached London, when the parcel was missed. Held, no evidence for the jury of the parcel having been stolen by a servant of the company. *Great Northern, &c. v. Rimell*, 37 Eng. L. & Eq. 245.

known of the delivery, with reasonable care.¹ So a railroad company are not liable as common carriers, for property deposited in their warehouse, to await orders from the owner for its transportation. And where the company are prohibited by their charter from charging as warehousemen for storage, they can be liable as gratuitous bailees only, for property so deposited.² So *roadside deposits*, made to save the trouble of hauling to a regular depot, are at the risk of the owners, until they are put on a freight car. And an action cannot be maintained against a railroad, as a common carrier, for the loss or destruction of goods thus deposited, at a place where there was no regular station and no agent, although a conductor of a freight train had promised to stop and take them.³ And a distinction is to be observed, between a delivery to a common carrier, and a delivery to a party who receives the goods in some other capacity for transportation. Thus where goods were shipped from New York to Charleston, for the plaintiffs, doing business in Columbia, South Carolina, to the care of the South Carolina Railroad Company, whose course of business it was to receive and forward goods so addressed; held, the company were not liable as common carriers, until the goods were received by them for carriage; that, as *forwarding agents*, their liability was not that of common carriers; but they would be liable for refusing to receive, unless they showed a good excuse; and, after receiving, for not taking all the care which a prudent man would take about his own business.⁴ (a)

§ 11. As a general rule, a common carrier must *deliver* the goods to the owner or consignee, personally, at the place where the transportation ends, or offer to deliver them, or give notice of their arrival, unless in case of a special contract or an opposite

¹ Ford v. Mitchell, 21 Ind. 54.

² Michigan, &c. v. Shurtz, 7 Mich. 515.

³ Wells v. Wilmington, &c. 6 Jones, 47.

⁴ Maybin v. Railroad Co. 8 Rich. 240.

See Reed v. Spaulding, 5 Bosw. 395.

(a) In case against a railway company, for negligence in carrying goods delivered to them as common carriers, whereby the plaintiff lost a market for them, the first plea traversed the delivery to, and acceptance of, the goods by the defendants, to be carried by them as common carriers; and other pleas averred that the goods were delivered on special conditions. It appeared, that the plaintiff delivered a quantity of cheese at a station of the defendants' railway, to be carried to B. for the purpose

of being sold at a certain market, and signed a note containing the condition, among others, that the company should not be liable for loss of market or other delay arising from detention. Held, that the Judge at the trial was right in nonsuiting the plaintiff, on the ground that the defendants had not received the cheese to be carried by them as common carriers. White v. The Great Western, &c. 40 Eng. L. & Eq. 255.

usage, if even such usage would vary the liability.¹ More especially, if it be the general course of his trade so to do.² (a) In pursuance of the contract in the bill of lading, carriers must show a delivery in good order, (b), and something more than

¹ *Schroeder v. Hudson*, &c. 5 Duer, 55; 2 Hilt. 150; *American, &c. v. Baldwin*, 26 Ill. 504. See *Price v. Powell*, 3 Comst. 322; *M'Henry v. Philadelphia*, &c. 4 Harring. 448; *Russell v. Livingston*, 16

N. Y. 515; 23 Ill. 197; *Hilliard v. Wilmington*, &c. 6 Jones, 343; *Gilkinson v. Steamboat*, 14 La. An. 417; *Sleade v. Payne*, Ib. 453.

² *Golden v. Manning*, 2 W. Bl. 916.

(a) The unlawful interference of a revenue officer with the landing is no excuse for not landing and storing goods. Nor a local usage, unless fully proved. *Rowland v. Miln*, 2 Hilt. 150.

Carriers by railroads, or steamboats engaged in the internal coasting and river trade, in the absence of a special contract, must deliver freight to the owner, consignee, or some authorized agent, or safely land it upon the wharf at the place of destination, or deposit it in their depot houses, and promptly notify the consignee. If delivered to a drayman, cartman, or any other person not authorized by the consignee to receive it, it is at the risk of the carrier. The usage or custom of a port cannot dispense with delivery, or notice of the landing of the goods; nor will the fact, that the consignee and others had submitted to a delivery of goods to a drayman, before, when no loss occurred, bind him to yield his legal right to notice when it is for his interest to assert it. *Dean v. Vaccaro*, 2 Head, 488; 6 Bosw. 235.

If the plaintiff alleges that the article sent was not delivered, he must prove the allegation; but slight evidence will change the burden of proof. *Woodbury v. Frink*, 14 Ill. 279.

Where the duty is alleged to be, safely to carry and deliver, the grievance may be stated to be *non-delivery within a reasonable time*. And when the declaration alleges a contract to carry for hire, and the defendant's duty to be, to carry safely and deliver; and, as the breach, that a reasonable time for the delivery has elapsed, but the defendants have not delivered the goods: the plaintiff may recover, upon proof of non-delivery within a reasonable time. *Raphael v. Pickford*, 5 Man. & Gran. 551.

The carrier is bound to deliver precisely as he agrees, notwithstanding unforeseen circumstances which create a difficulty in so doing. Thus the defendant, a common carrier, received from the plaintiff a package of money, to convey from S. to P., and deliver at the bank in P. When he arrived at P., the bank was shut. He went twice to the house of the cashier, and, not

finding him at home, brought the money back, and offered it to the plaintiff, who declined to accept it. The defendant then refused to be further responsible for any loss or accident. Held, not a legal excuse for non-performance of the undertaking. *Merwin v. Butler*, 17 Conn. 138.

The time of delivery is a *reasonable time*. *Nettles v. Railroad Co.* 7 Rich. 190. See p. 550; *Place v. Union*, &c. 2 Hilt. 19.

If a carrier is delayed a whole season by stress of weather, he is still responsible for the safe-keeping of the goods, as a carrier, and not as a mere warehouseman. *Western, &c. v. Newhall*, 24 Ill. 466.

A year is an unreasonable time for a carrier to take to convey a package from Boston to Milwaukee, and upon the expiration of that time the owner may well maintain an action for non-delivery. *Nudd v. Wells*, 11 Wis. 407.

After the actual of such a right of action, a delivery to a connecting carrier, to forward, is not good, though it would have been if made in due season; and the second carrier cannot waive the owner's right of action by an acceptance for him without an express authority. *Ib.*

But a demand by the plaintiff for the goods is a waiver of the non-delivery to the time of the demand, though not a waiver of damages for the delay; therefore if the defendant had delivered them to a connecting carrier as above, before that demand, the delivery is good, and he is only liable for the delay, and not as for a non-delivery (or conversion). *Ib.*

If there has been delay in delivering, and if the price of the goods is the same when they are delivered as when they ought to have been delivered, the damages for delay will be the interest on the value of the goods for the period between these times. *Smith v. Whitman*, 13 Mis. 352.

The rule of law, that common carriers are bound as *insurers* for the safe delivery of goods, does not extend to the time of delivery. *Boner v. Merchants, &c.* 1 Jones, 211.

(b) With reference to the party to whom delivery shall be made, the plaintiff deliv-

putting goods on shore or on a wharf. There must be notice to the consignee (*a*) or some excuse for not giving it, and a reasonable time given (*b*) to attend and receive the goods.¹ Thus,

¹ *Scholes v. Ackerland*, 15 Ill. 474; *Barclay v. Clyde*, 2 E. D. Smith, 95.

ered to expressmen, running to Sacramento, a bag of gold dust, directed to the United States mint at San Francisco; they gave it to other expressmen, — W. & Co., — running from Sacramento to San Francisco; and the latter delivered it at the mint. The agent, in San Francisco, of W. & Co., afterward received the coin from the mint, signing the receipt, "W. & Co. for P. T." (plaintiff), and delivered it to the first-named expressmen, marking it with their name, "for acct of P. T." No instructions appeared to have been given by the plaintiff to either express company. The coin was never delivered to the plaintiff. Held, neither of them had any authority to receive the money, and the agent of W. & Co., acting knowingly beyond the scope of his authority, was personally liable to the plaintiff for the value of the coin. *Tuite v. Wakelee*, 19 Cal. 692.

A railroad company have the right to demand a receipt for goods carried by them before they will be bound to deliver the goods, and the consignee has the right to an opportunity to examine the condition of the goods before signing the receipt. *Skinner v. Chicago*, &c. 12 Iowa, 191.

When a railroad company have freight in their warehouse ready for delivery, they are not bound to take receipts for it, part by part as it is taken away, but may require a receipt for the whole before delivering any. *Morris, &c. v. Ayres*, 5 Dutch. 393.

In regard to delivery, a carrier may presume, in the absence of some notice to the contrary, that the consignee is the owner of the goods. *Sweet v. Barney*, 23 N. Y. (9 Smith), 335.

The plaintiff shipped tubs of butter by the defendant's boat, and directed the captain to sell them on arrival; on arrival, the captain hauled the boat to the pier, and gave her in charge to another agent of the carrier; the next day the butter was placed on deck, the captain sold part, and the rest was stolen. Held, that from the time the butter was placed on deck, it was to be deemed delivered to the captain as the shipper's consignee, and that the defendant's liability thereupon became that of a warehouseman. *Labur v. Tuber*, 35 Barb. 305.

(*a*) It is held, that the carrier of goods by railway is not bound to seek out the consignee and offer to deliver them. It is the business of the consignee to repair to the depot to receive the goods, and, if the carrier refuse to deliver them without valid

excuse, an action will lie. The fact, that some of the goods have been damaged in their transit, does not authorize the consignee to reject the goods entirely, and hold the carrier liable as for a total loss; neither does it devolve on the carrier any obligation to make an offer to deliver, otherwise than as if the goods had arrived uninjured. *Michigan, &c. v. Bivens*, 13 Ind. 263.

It is as much a part of the contract, that the owner or consignee shall be ready at the place of destination to receive the goods when they arrive, or within a reasonable time thereafter, as that the carrier shall transport and deliver them. *Alabama, &c. v. Kidd*, 35 Ala. 209.

But if the carrier undertake to deliver to his own agent, instead of the owner, he becomes liable as a warehouseman, after the arrival of the goods, and a warehouseman with whom he stores them, is his and not the owner's agent, and the carrier is liable if the goods are thence delivered to an unauthorized person. 1*b*.

A carrier may be relieved from his obligation to deliver goods at one place, by the consent of the consignee to receive them at another; but not by an offer to receive them on certain conditions, which was refused. *Arbuckle v. Thompson*, 37 Penn. 170.

(*b*) The consignee of flour sent by rail demanded the flour at the freight depot the morning after its arrival, which was late in the afternoon, and it was not to be found. The railroad company was held liable. *Milwaukee, &c. v. Fairchild*, 6 Wis. 403.

The plaintiff occupied a room in the fourth story of a building, and the carrier brought a box, weighing about sixty pounds, and placed it within the outside door of the building at the foot of the stairs, and then went up and notified a boy whom he found in the office, that the box was there and must be taken care of. The boy was not authorized to receive packages. Held, not a delivery. *Haslam v. Adams, &c.* 6 Bosw. 235.

As between a consignee (a bank) and an express company in the habit of carrying their packages, it is competent for the carrier to prove, that, after banking-hours, the bank is closed only as to banking-business, and not as to the reception of packages, but that the latter have habitually been received on the arrival of the trains after banking-hours. That fact being proved, a tender of the package to the bank an hour

on landing goods, carriers by coasting vessels must give notice to the owner or to the consignee; and, if either refuses to receive them, the carrier must safely secure them.¹ (a) So if common carriers from A to B charge and receive, for cartage of goods, to

¹ *Crawford v. Clark*, 15 Ill. 561.

and a half after banking-hours, at half past five o'clock, P. M., in summer, is a good and reasonable tender; after which the carrier is liable at most only for gross negligence. *Marshall v. Wells*, 7 Wis. 1.

A ship was ready to discharge, and, the consignees being notified, she began to discharge on Monday; the consignees took the freight away up to Wednesday night, leaving then a few bales on the wharf; Thursday was the annual "fast day" appointed by the governor. During the forenoon of that day more cargo was unloaded, and on the afternoon all that was on the wharf was burnt. Held, there was a good delivery to discharge the carrier from all liability. That, although the consignee might refrain from labor on that day, he did it at his own risk, and could not compel the carrier to refrain from delivering the goods, as there was no law of Massachusetts forbidding labor on that day, no custom engrafted into the maritime law, forbidding the tender of a cargo to a consignee on a church festival, fast, or holiday; and no special custom in the port of Boston compelling the carrier to observe "fast" as a holiday. *Richardson v. Goddard*, 23 How. 28.

In case of non-payment of freight, the goods being sent back too soon, the railroad was held liable. *Great, &c. v. Crouch*, 3 H. & N. 183.

With reference to the general question of time (see p. 548); a carrier is bound to proceed with due diligence and usual dispatch, and the onus is on him to excuse his delay. Where the owner of cattle to be transported makes his own selection from the vehicles of the carrier, under circumstances charging him with knowledge of their capabilities and defects, the carrier is not responsible for any injury which results exclusively from those defects. But as the owner may assume that there will be no improper detention, the carrier will be responsible, if damage result from cars ill adapted to the purpose, in case of detention. As to defects not plainly apparent or visible, the burden is on the company, to show that the plaintiff had knowledge of them. As a train is in the charge and control of the company's agents, the company is responsible, if their refusal to allow cattle to be taken out and watered during a detention result in damage, although the owner's drovers accom-

pany the cattle. *Harris v. Northern, &c.* 20 N. Y. (6 Smith), 232.

(a) Where a box of goods is carried to the place of destination, and there tendered to the consignee, who refuses to receive it, the carrier's liability is discharged by placing the box upon storage with a responsible warehouseman, who thereby becomes a bailee or agent of the owner. It is doubted whether in ordinary cases notice must not be given of such deposit; but this is unnecessary where the owner has not informed the carrier of his name and residence. *Williams v. Holland*, 22 How. (N. Y.) 137.

Goods belonging to the plaintiffs were received by the defendants, at the city of New York, on the 14th and 15th days of August, 1848, to be carried to Albany, and there delivered to A, the agent, at Albany, of the Rochester line of canal-boats. The goods were put on board a barge of the defendants, at New York, and taken to Albany, where they arrived on the morning of the 17th, and were destroyed by fire on that day, while in the possession of the defendants. A portion of them had been unloaded from the barge, and put into a float, in the Albany basin, belonging to the defendants, which was a stationary floating craft, kept for the purpose of receiving goods brought up the river, with different apartments for the different transportation lines West. It had been there for several years, and the custom was, to discharge goods brought up the rivers into it, from which the goods were reshipped into canal-boats, to be taken West, the canal-boats coming alongside, and receiving them. Held, that the defendants, having contracted to deliver the goods, &c., at Albany, continued to hold the relation of common carriers, until they were so delivered, or until a reasonable time should have elapsed after notice to the agent of their arrival, and an offer to deliver; that the defendants were not warehousemen at the time the goods were burned; that they had no right to warehouse them, unless in case of the absence of the person authorized to receive them, or of his neglect or refusal, after reasonable notice; and that the loss was not the result of inevitable accident, or the act of Providence. *Miller v. Steam Navigation Co.* 13 Barb. 361; acc. *Steamboat Sultana v. Chapman*, 5 Wis. 454.

the consignee's house at B, from a warehouse there, where they usually unload, but which does not belong to them; they must answer for the goods, if destroyed in the warehouse by an accidental fire, though they allow all the profits of the cartage to another person, and that circumstance be known to the consignee.¹ So it is held, that, when a railroad company carry goods on freight, it is their duty to give to owners and consignees actual notice of the arrival of the goods, or to show such a usage to the contrary, as warrants the presumption that contracts were made in reference to it;² and that their liability as carriers continues, until the consignee has had a reasonable time to remove the property.³ (a) So a railroad company can make a valid contract for the transportation of freight beyond their own road as fixed by the charter.⁴ (b) And they are liable, though no demand be made at the point of termination, if the goods never reached the point in question, and they had no office there, nor any agent on whom the demand could be made.⁵

¹ *Hyde v. Trent*, &c. 5 T. R. 389.

² *Rome, &c. v. Sullivan*, 14 Geo. 277; 2 Mich. 538.

³ *Michigan, &c. v. Ward*, 2 Mich. 538.

⁴ *Schröder v. Hudson*, &c. 5 Duer, 55. See *Illinois, &c. v. Copeland*, 24 Ill. 332;

Rome, &c. v. Sullivan, 25 Geo. 228; *Coxon v. Great*, &c. 5 H. & N. 274; *Wing v. N. Y. &c.* 1 Hilt. 235; *Bristol, &c. v. Collins*, 5 H. & N. 969; *Mytton v. Midland, &c.* 4 Hurl. & N. 615.

⁵ *Schröder v. Hudson*, &c. 5 Duer, 55.

(a) A provision in the charter of a railroad company, that, after certain notice to a consignee of the receipt of property, storage may be charged, and that in all cases the company shall be responsible for goods in deposit in any of their depots awaiting delivery, as warehousemen, and not as common carriers, does not exonerate the company from liability as carriers, where such notice has not been given. The language, "awaiting delivery," applies to the goods only after notice. 2 Mich. 538.

(b) It is held, that a railroad company may be bound, by a special contract (but not otherwise), to transport persons or property beyond the line of their own road. A company may be thus bound, without any actual arrangement with connecting lines, if, by their agents, they hold themselves out to be common carriers to a place beyond the limits of their own road. *Perkins v. Portland*, &c. 47 Maine, 573.

The presumption is held to be in favor of liability for the whole route. Public policy is against a division of responsibility. *Ladue v. Griffith*, 25 N. Y. (11 Smith), 364.

A common carrier is liable for the loss of goods delivered to him, as such, at New

York to be carried to Albany, and by him carried up the river, where a portion of them were transferred to a float, belonging to such carrier, preparatory to their delivery, and were there destroyed by fire. *Miller v. Steam*, &c. 10 N. Y. (6 Seld.) 431.

Goods had been discharged from the barge of a North River carrier to his float in the Albany basin, and notice repeatedly given to the forwarders to whom they were directed to take them, when they were destroyed by fire. Held, the transfer to the float was not a delivery, but merely preparatory to delivery, and that by the delays the carrier did not become a depository, but was responsible for the loss. *Goold v. Chapin*, 20 N. Y. (6 Smith), 259.

Under the (New York) act of 1847, c. 270, a railroad company, receiving goods under an agreement for transportation to a point beyond the terminus of its own road, and upon the line of a connecting road, whether within or without the State, is responsible as a common carrier for these goods, both upon its own line and upon the line of the connecting road. *Burtis v. Buffalo*, &c. 24 N. Y. (10 Smith), 269.

And such contract is a valid one, independently of the statute. *Ib.*

So although the agent, who contracted for their transportation, had no authority to receive goods of that description for the point in question, or to make any special contract; if he was their general agent in making contracts for the reception and transportation of freight, and the plaintiff had no knowledge or notice of any limitation of his powers.¹ So the contract of a common carrier, who receives goods addressed to a person beyond the terminus of his route, without limiting his liability, is to deliver them, in the same condition in which they were received, to the consignee; nor is the consignor compelled to inquire, how many corporations make up the entire route, nor, having ascertained this, to determine at his peril which of these corporations has been guilty of the negligence which caused the injury.² But the owner of goods, by waiving any of his rights touching the delivery, so far relieves the carrier from his liability.³ Thus, if the owner sends a servant to meet the goods, who takes charge of them, the carrier's responsibility is at an end.⁴ So, in an action against an express company, it appeared that money was delivered to the company, marked for the plaintiff's corresponding bank in New York. The money had been carried to New York, and, on its arrival at the defendant's office there, a person in the employ of the bank called for it, and it was delivered to him, he receipting for it in the book of the company. He had received and receipted, in the same way, for every package directed to the bank, and carried by the company, for that month; and, during the last six months, he had received more than half the packages for the bank; and this mode of delivery to him was adopted, at the request of the bank officers, and was for the accommodation of the bank, and not the express company; and packages so delivered had been regularly credited by the bank, and no exception taken. On his way from the office to the bank, the messenger was robbed of the package, and this action was brought to recover the amount of the money contained in it. Held, the above facts were a good defence.⁵

§ 12. When common carriers have carried goods to their destination, and given notice to the consignees of their arrival, if the goods are not called for within a reasonable time, their strict lia-

¹ *Schroeder v. Hudson, &c.* 5 Duer, 55.

⁴ *East India Co. v. Pullen*, 2 Stra. 690.

² *Foy v. Troy, &c.* 24 Barb. 382.

⁵ *Sweet v. Barney*, 24 Barb. 533.

³ *Stone v. Waite*, 31 Maine, 409.

bility as carriers ceases, and they retain possession as mere bailees in deposit.¹ And the doctrine, somewhat conflicting with that already stated, has been laid down, that a railroad company, who transport goods over their road, and deposit them in their warehouse without charge, until the owner or consignee has a reasonable time to take them away, are not liable, as common carriers, for the loss of the goods from the warehouse, but are liable as depositaries only for want of ordinary care.² (a) The company are bound to carry freight safely to the place of destination, and there to safely deposit it in their warehouse, and to store it without extra charge until the consignee has a reasonable opportunity to remove it.³ So where goods were deposited on the platform, in the usual place, ready for delivery, and the consignee notified thereof, and he paid the freight; held, the liability of the railroad as carriers was thereby at an end, and, even if the delivery and acceptance was not complete by the payment of freight and the lapse of a reasonable time for removal, yet the liability of the railroad was thereafter only that of warehousemen, and, as the goods were destroyed by fire without negligence on the part of the company, the owner must bear the loss.⁴ So after the goods are safely deposited in the storehouse, the company will be liable only as warehousemen, and only responsible for ordinary neglect. And it is held that they are not bound to give notice of the arrival.⁵ So when a common carrier, by steamboat or other vessel, in the due and common course of his business, delivers his goods or parcels into the custody of the wharfinger, upon the wharf, the transit is ended, and his responsibility as carrier ceases, unless he have, either expressly or by fair implication, undertaken to do something more; and the question, as to the time and place when the duty of the carrier ends, is one of contract, to be determined by the jury from a consideration of all that was said by either party, at the time of the delivery and acceptance of the parcels by the carrier, the course of the business, the practice of the carrier, and

¹ *Rome, &c. v. Sullivan*, 14 Geo. 277.

² *Thomas v. Boston*, &c. 10 Met. 472. See *Rowe v. Pickford*, 1 Moo. 526; *Allan v. Gripper*, 2 Cr. & Jerv. 218; *Teall v. Sears*, 9 Barb. 317; *Jackson v. Sacramen-*

to, &c. 23 Cal. 268; *Morris, &c. v. Ayres*, 5 Dutch. 393.

³ *Morris, &c. v. Ayres*, 5 Dutch. 393.

⁴ *New Albany, &c. v. Campbell*, 12 Ind.

55.

⁵ *Morris, &c. v. Ayres*, 5 Dutch. 393.

(a) *A fortiori*, after refusal to receive the goods. *Hathorn v. Ely*, 28 N. Y. (1 Tiffa.) 178.

all other attending circumstances.¹ So, in an action against a railroad corporation as common carriers, for the loss of goods directed to New York, a place situated beyond the terminus of such road; the declaration alleged, that the defendants were common carriers to New York. On the trial, it was admitted that the goods had been transported safely over the defendants' road, and deposited on board a steamboat for New York, where they were burnt. The plaintiff gave in evidence the defendants' charter, containing a permission thus to carry goods, also an advertisement, published in a newspaper, stating that freight would be billed by the defendants to New York, and evidence that the plaintiffs had been in the practice of sending freight to New York over the defendants' road from the time it went into operation, and that the defendants had made no demands of the plaintiffs for the freight of the goods, and then rested their cause. The defendants thereupon moved for a nonsuit, which was granted. Held, that such nonsuit ought not to be set aside.²

§ 12 *a*. But although the liability of an express company as common carriers may have ceased, they will nevertheless be liable if the goods are lost through the negligence of their agents. As where the property was locked up in a safe, and the key put in the coat-pocket of the expressman, which was left hanging near an open window of a room on the ground floor of a house in the city, where the expressman, who was a sound sleeper, slept; and the key was stolen, the safe opened, and the property stolen.³

§ 13. A carrier, who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or destroyed by the act of God or the king's enemies; even though the jury find expressly that the goods were destroyed without any, even the slightest, actual negligence in the carrier. He is liable for inevitable accident, happening through the intervention of any human means.⁴ (*a*) "It appears from all the cases for one hundred years

¹ *Farmers', &c. v. Champlain, &c.* 23 Verm. 166.

² *Naugatuck, &c. v. Waterbury, &c.* 24 Conn. 468. See *Lowell, &c. v. Sargent*, 8 Allen, 189; *Johnson v. N. Y. &c.* 31 Barb. 196.

³ *American, &c. v. Baldwin*, 26 Ill. 504.

See *Great, &c. v. Rimell*, 6 C. B. N. S. 917.

⁴ *Forward v. Pittard*, 1 T. R. 27; *Central, &c. v. Hines*, 19 Geo. 203; *Pendall v. Rench*, 4 M'Lean, 259; *M'Henry v. Philadelphia, &c.* 4 Harring. 448; *Laveroni v. Drury*, 16 Eng. L. & Eq. 510; *Powell v. Mills*, 30 Miss. 231.

(*a*) The reason of this strict liability is thus expressed in the civil law: "Nisi hoc esset statutum, materia daretur cum furi-

bus adversus eos quos recipiant exeundi, cum ne nunc quidem absterneant hujusmodi fraudibus." Dig. 4, 9, lib. 1.

back, that there are events, for which the carrier is liable, independent of his contract."¹ A carrier is in the nature of an *insurer*. The obligation of a common carrier does not arise out of *contract*, in the usual sense of that expression, but it is declared by law, and his responsibilities are fixed by considerations of public policy.² He is bound to guard against future, as well as to rescue from present; danger.³ Thus a hoyman, who undertakes to carry goods, must deliver them safe at all events, except damaged by the act of God, or by the king's enemies.⁴ Though a hoyman is not answerable for goods lost by the accidental oversetting of his hoy by the wind.⁵ (a)

§ 14. Unavoidable accidents, or acts of God, are any accidents produced by physical causes which are inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness, &c.⁶ (b) But the act of God, which would excuse a common carrier, must be the *immediate*, and not the *remote*, cause of the loss.⁷ (c) It must be a *direct and violent act of*

¹ Per Ld. Mansfield, *Forward v. Pittard*, 1 T. R. 27.

² *Thurman v. Wells*, 18 Barb. 500.

³ *Watts v. Saxon*, 11 La. An. 43; *Blocker v. Whittenburg*, 12 Ib. 410.

⁴ *Dale v. Hall*, 1 Wils. 281.

⁵ *Amies v. Stevens*, 1 Str. 127.

⁶ *Fish v. Chapman*, 2 Kelly, 349.

⁷ *King v. Shepherd*, 3 Story, 349; *Oakley v. Port, &c.* 34 Eng. L. & Eq. 530; *M'Henry v. Philadelphia, &c.* 4 Harring. 448.

(a) The *act of law* would seem to furnish another excuse. A common carrier, from whom the goods are actually taken and kept by a valid process of law, is thereby excused from delivery. It is immaterial that the process was obtained by fraud, if the carrier is in no way privy thereto. As where the property was taken under a search-warrant, and was by the court ordered to be delivered to one who claimed that it had been stolen from him by the bailor. *Bliven v. Hudson, &c.* 35 Barb. 188.

There is no difference in point of law, between common carriers on land and common carriers by water. *King v. Shepherd*, 3 Story, 349.

Nor between a liability for *goods*, and that for *brute animals*. 4 Kern. 570; *Wilson v. Hamilton*, 4 Ohio, N. S. 722. But see § 14.

The principle, that, where both parties are equally to blame in causing an injury, neither can recover, does not apply to a case where goods are delivered to a carrier during the peril of a storm. It is for him to decide whether they can be safely received, and if he receives them he is liable from that time. *New Brunswick, &c. v. Tiers*, 4 Zab. 697.

The cause of loss or damage is a question

for the jury. *Hall v. Renfro*, 3 Met. (Ky.) 51.

(b) A carrier of goods or cattle is only bound to carry in a reasonable time under ordinary circumstances, and is not bound to use extraordinary efforts or incur extra expense, in order to surmount obstructions caused by the act of God; as a fall of snow. *Briddon v. Great, &c.* 4 Hurl. & Nor. 847.

(c) But on the other hand the carrier is not liable, if his own act is not the proximate, though in part the remote, cause of loss. Thus the defendants contracted to transport certain goods upon a canal. By reason of an extraordinary flood in a certain division of the canal, the boat was wrecked, and the goods greatly damaged. The boat started on its voyage with one lame horse, by reason whereof great delay was occasioned, but for which the boat would have passed the point where the accident occurred before the flood came, and have arrived safely and in time at the point of destination. Held, that the use of the lame horse was too remote a cause of the accident to render the defendants liable. *Morrison v. Davis*, 20 Penn. 171.

Where goods were placed on the main deck, between the hatches of a propeller,

nature. Thus, where a boat upon a river is stranded upon a recently formed bar, of which the carrier was ignorant, he is liable.¹ So, if it might not have happened but for the negligence of man, the carrier is liable. Therefore, where a violent storm causes an unusually low tide, and the carrier's barge, lying at the pier, is pierced by a projecting timber, covered at ordinary tides, and not known by the carrier to exist; he is liable, notwithstanding his leaving the barge there would not have produced the injury, without the concurrence of the act of God, and the negligence of the wharf-builder.² So where the injury was caused by contact of the steamboat with the mast of a sloop, sunk in a squall two days before, which mast was fifteen or sixteen feet out of water at low tide, and was visible the day before and on that day.³ So a ship sailed from New Orleans for New York, on the 20th of June, with a cargo of tobacco in hogsheads, and lard in barrels, the hogsheads and barrels being badly stowed and coopered. When she was seventeen days out, not having met any very rough weather, lard was pumped from her, and the tobacco was damaged by the lard running into it. Held, that this damage was occasioned by other causes than the perils of the sea, and that the ship was responsible for it.⁴ So a carrier is responsible for injuries to perishable goods (potatoes) by cold, where due care in view of all the circumstances was not taken to protect them.⁵ So a general ship at New Orleans took 354 barrels of flour for Boston, and also 190 barrels of spirits of turpentine, the effluvia of which injured the flour. Held, the carrier was responsible. Though an established usage to carry those articles, as parts of the same cargo, on such a voyage, would have exonerated him.⁶ So a leak in the ship furnishes no excuse.⁷ So where, pursuant to a contract of affreightment, the master of a ship had taken part of the cargo into his custody at Mobile, and conveyed it a distance of several miles, in a steam lighter, to his

¹ *Friend v. Woods*, 6 Gratt. 189.

² *New Brunswick, &c. v. Tiers*, 4 Zab. 697.

³ *Merritt v. Earle*, 29 N. Y. (2 Tiff.), 115.

⁴ *The Newark*, 1 Blatch. Ct. Ct. 203.

⁵ *Wing v. New York, &c.* 1 Hilt. 235.

⁶ *Col. Ledyard, Sprague*, 530.

⁷ *Emma Johnson, Sprague*, 527.

and were necessarily thrown overboard and lost in a tempest, by order of the master, for the preservation of the vessel, &c.; held, the owners of the vessel were not liable. *Gillett v. Ellis*, 11 Ill. 579.

In an action against a common carrier upon a bill of lading, for a failure to deliver

cotton in good order, all the damage being caused by rains; a custom, known to the plaintiff, to transport cotton and other freight, between the points named in the bill of lading, in open boats, constitutes a good defence. *Chevaillier v. Patton*, 10 Tex. 341.

ship, but it was destroyed by *the bursting of the boiler*, while alongside and before it was taken on board; held, that the owner of the goods was entitled to recover for the damage sustained, and had a lien therefor upon the ship.¹ So, when transporting animals by railroad, the carrier is responsible for an injury not caused by an occurrence incident to such transportation, and which might be avoided by diligence and care.² So a railroad cannot set up as inevitable accident, that the cars were thrown from the track by accidentally running over a man; if he was a drover, attending to cattle on the train, and fell off for want of a suitable place for such persons, and because compelled to stand on the bumpers; although he fell by his own carelessness.³ But injury to goods shipped in the hold of a vessel, resulting from an intrinsic principle of decay inherent in the goods themselves, or from the natural closeness and dampness of the hold, on a voyage delayed by boisterous weather and adverse winds, is not damage for which the carrier is responsible, who has undertaken, by a bill of lading in common form, to deliver the goods in like good order and condition as shipped, "dangers and accidents of the seas and navigation of whatsoever nature and kind excepted;" unless he might have prevented the damage by usual and proper skill, precaution, and diligence, the burden of proving which is on the owner of the goods.⁴ So in a case of shipment of lard from New Orleans, in summer, the casks were well coopered when loaded, and well stowed, but, upon arrival at New York, there had been a very great loss of weight. The lard was shipped in extraordinarily hot weather; and lard of this quality, in very hot weather, is apt to liquefy; in so doing it expands, which causes the hoops of the casks to slip and the casks to leak. On the arrival at New York, the hold of the vessel was excessively hot, and the hoops started on most of the casks, both those near the deck and those at the bottom. Held, the shipper must bear the loss.⁵ So a vessel loaded with fruit, under a bill of lading exempting her from loss by liability to decay, was obliged to put into a port of distress, and, finding there no vessel by which to forward the cargo, made repairs with all the speed possible at that port, and meantime took such

¹ Edwin, Sprague, 477. See 18 Eng. L. & Eq. 346. ⁴ Clark v. Barnwell, 12 How. U. S. 272; Rich v. Lambert, *Id.* 347.

² Clarke v. Rochester, &c. 4 Kern. 570.

⁵ Nelson v. Woodruff, 1 Black. 156.

³ Goldey v. Pennsylvania, &c. 30 Penn. 242. See Place v. Union, &c. 2 Hilt. 19.

care of the cargo as the persons at that port most experienced in such cases advised. Held, the carriers were not responsible, for the loss of the fruit by decay ; also, that, whether the best was done to take care of the cargo was immaterial, it appearing that the master acted to the best of his judgment, guided by advice which was the best he could procure, and which he had reason to believe could be relied on.¹ And the same rule is applied, in transportation of animals, to any damage caused by the animal's own viciousness or by that of other animals on board with it at the time.²

§ 15. If a common carrier by water be prevented from delivering goods on account of the freezing up of the river, his obligation to deliver them in a reasonable time after the resumption of navigation will still continue.³ And it is the duty of a carrier, when goods in his care are injured, to make reasonable exertions to repair the injury or arrest its progress. Hence, if packages of fur become wet, he should have them opened and dried.⁴ Though the master of a steamboat carrying wheat, which was wet by inevitable accident, was held not liable for damages because he did not dry the wheat.⁵ So a carrier is liable in case of loss by fire, even though originating in a building other than that where the goods are stored.⁶ As in case of an accidental fire or conflagration in a city.⁷ So, if common carriers receive goods with orders to "ship immediately," which are stored in their warehouse on account of the obstruction of navigation, and there consumed by fire, they are liable for their value.⁸ So the proprietor of a steamboat is liable for cotton carried by him, which is destroyed by fire on board his boat, unless he can show a well-known, recognized, and established usage, to exempt such carriers from such liability, except where a higher rate of freight is paid ; or unless a general and well-understood notice to that effect has been given by this particular carrier, so as to constitute a part of the implied contract ; and even in those cases the carrier should be held to strict proof of diligence and care.⁹ So a statute, limiting the responsibility of ship-owners for a loss occasioned by fire, does not extend to the case of a

¹ Collenberg, 1 Black, 170.

² Hall v. Renfro, 3 Met. (Ky.) 51.

³ Lowe v. Moss, 12 Ill. 477.

⁴ Chouteaux v. Leech, 18 Penn. 224.

⁵ Steamboat Lynx v. King, 12 Mis. 272.

⁶ Forward v. Pittard, &c. 1 T. R. 27.

⁷ Miller v. Steam, &c. 10 N. Y. (6 Seld.), 431.

⁸ Clarke v. Needles, 25 Penn. 338.

⁹ Singleton v. Hilliard, 1 Strobb. 203.

fire happening on board a lighter, employed in carrying goods from the shore to be loaded on board a ship.¹ (a)

§ 16. A common carrier by water is liable for a loss caused to goods by unnecessary *delay and unseaworthiness* of the vessel; unless the loss would have happened without such delay and unseaworthiness.² And where a cargo consisted of salt and earthen and other wares, and the latter were injured, and no evidence appeared that there had been a stress of weather or great storms during the voyage, nor of the condition of the vessel before it sailed; held, it was incumbent on the carrier to show, that the injury had happened from a cause for which he was not liable; and, as a bad condition of the vessel had been developed, and no cause shown for it, it was a presumption of fact, though not of law, that the vessel was unseaworthy when she sailed.³ But, in an action against a carrier, on a bill of lading, for a loss of freight, although his boat was not seaworthy, it is yet competent for him to show, that the loss was in fact occasioned by the excepted perils of the river, and not by the unseaworthiness of the boat, and must have happened if that defect had not existed; though a delinquency which might have contributed to the disaster occasioning the loss, or negligence or carelessness at the time of its occurrence, which might have had an agency in producing it, will render him liable.⁴ So to an action against one railroad corporation for non-delivery of cattle in reasonable time, it is a good defence, that the delay was caused by a collision wholly owing to the negligence of another corporation.⁵ (b)

¹ *Morewood v. Pollok*, 18 Eng. L. & Eq. 341. See *Sprague*, 477.

² *Smith v. Whitman*, 13 Mis. 352; *Gallena, &c. v. Rae*, 18 Ill. 488.

³ *Cameron v. Rich*, 4 Strobh. 168.

⁴ *Collier v. Valentine*, 11 Mis. 299.

⁵ *Conger v. Hudson, &c.* 6 Duer, 375.

(a) Even in case of a contract for exemption from liability for fire, the carrier must prove due care. *Berry v. Cooper*, 28 Geo. 543.

(b) In reference to the liability of a common carrier, as affected by his contract; though the bill of lading be silent as to the matter, the law implies an exception as to losses occasioned by inevitable accident; but such implication may be repelled by parol proof, connected with advertisements and circulars, of an agreement to insure a safe delivery without any exception. *Morrison v. Davis*, 20 Penn. 171. See *Fleming v. Mills*, 5 Mich. 420.

A common carrier, contracting to forward goods "by sail on the lake," all lake

dangers being in that case taken by the owners, is liable as insurer for their loss, if sent by steam. *Merrick v. Webster*, 3 Mich. 268.

A common carrier, who receipts for goods as being "in good order and well-conditioned," where the goods are closely boxed, may, in an action by the shipper for damage done to the goods, show by parol evidence that the goods were in fact damaged when they were shipped. *Gowdy v. Lyon*, 9 B. Mon. 112.

As to what constitutes positive *negligence* in a common carrier, it is held that the omission to provide bars for the open ends of a ferry-boat, frequently used in transporting horses, affects the carrier with liability,

§ 16 *a*. A common carrier is liable even for a loss by act of God, if himself in fault; as where the goods were wetted at the depot, by an extraordinary flood, caused by the obstructions of the water in a channel by ice, there having been unreasonable delay in forwarding them.¹ So though a vessel be lost by act of God, the carrier is bound to use due diligence in providing another.² (*a*) But proprietors of a railroad, who negligently delay the transportation of goods, and then transport them safely, are not responsible for injuries to the goods by a flood while in their depot, although the goods would not have been exposed to such injury but for the delay.³

§ 17. In an action against a common carrier, it is sufficient to prove that the goods were received by the carrier, and that he has failed to deliver them, according to his undertaking.⁴ And if the carrier cannot show that the loss has accrued by one of the excepted perils, he is liable. Proof of negligence is unnecessary to charge him, and proof of diligence will not excuse him.⁵ Thus a box of sovereigns was shipped, to be carried for hire from New York to Mobile, and the bill of lading only contained the usual exceptions against perils of the seas. The vessel was wrecked on the "Honda Reefs," and the captain then removed the box from the state-room, where it could be locked up, and placed it in the run, where the crew had free access, and allowed it to remain there, without personally superintending it, while the wreckers were on board. The box was lost; and a libel was brought against the

¹ *Read v. Spaulding*, 30 N. Y. (3 Tiff.) 630; 5 Bosw. 395.

² *Williams v. Vanderbilt*, 28 N. Y. (1 Tiff.) 217; *Williams v. Vanderbilt*, 29 Barb. 491.

³ *Denny v. New Y. &c.* 13 Gray, 481.

⁴ *McCall v. Brock*, 5 Strobb. 119.

⁵ *Ibid.*

for neglect, in case of loss from that cause. *Wilson v. Hamilton*, 4 Ohio, N. S. 722.

But negligence in the management of a boat is not a conclusion of law from the circumstance that a difficult place was passed by the boat in the night. *Ready v. Steamboat, &c.* 17 Mis. 461.

And the rule, which imputes carelessness to a captain, whose boat strikes a known rock or shoal, unless driven by a tempest, is only applicable to the navigation of the ocean, where the rocks and shoals are marked upon maps and may be avoided, and does not apply to the navigation of the Western rivers. There, each case must be governed by its own circumstances, and be tested by the course usually pursued by

skilful pilots in such cases. *Collier v. Valentine*, 11 Mis. 299.

(*a*) Carriers are bound to convey with reasonable expedition. It is no answer to an action against them for damages arising from delay, that they carried at their ordinary rate. *Blakemore v. Lan. &c.* 1 F. & F. 76.

But proprietors of a railroad, who negligently delay the transportation of goods, and then transport them safely, are not responsible for injuries to the goods by a flood while in their depot, although the goods would not have been exposed to such injury but for the delay. *Denny v. N. York, &c.* 13 Gray, 481.

master and owners to recover its value. Held, the burden of proof was on the respondents to show, that the loss occurred by a peril of the seas; and, failing in this, they were responsible for the loss, however it occurred.¹

§ 18. A common carrier is sometimes held liable in *trover* for losing goods.² (a) Thus for a carrier to deviate from his established route is a misfeasance, and, if the goods be lost during the deviation, a conversion.³ And he is thus liable, although he has no beneficial interest, if he misuses a chattel intrusted to him, puts it into the hands of a third person without order, or by mistake, or on a forged order.⁴ So *trover* lies, for recovering goods of a carrier, which he has damaged, and detains for freight. And this without averring payment or tender of a reward for transportation and safe-keeping.⁵ But the prevailing rule is, that *trover* will not lie against a common carrier (or a wharfinger) where the goods are stolen or lost; but the remedy must be by an action on the case.⁶ Nor for goods lost by nonfeasance merely.⁷ (b) Nor for omitting seasonably to deliver the goods; without a previous demand.⁸ And in general it is held, that a demand is necessary, before *trover* will lie.⁹ (c)

¹ *King v. Shepherd*, 3 Story, 349.

² *Greenfield, &c. v. Leavitt*, 17 Pick. 1.

³ *Phillips v. Brigham*, 26 Geo. 617.

⁴ *Trowell v. Youmans*, 5 Strobb. 67.

⁵ *Ewart v. Kerr*, 1 Rice, 204.

⁶ *Ross v. Johnson*, 5 Burr. 2825.

⁷ *Bowlin v. Nye*, 10 Cush. 416.

⁸ *Robinson v. Austin*, 2 Gray, 564.

⁹ *Rome, &c. v. Sullivan*, 14 Geo. 277.

(a) The plaintiff, having been imposed upon by a swindler, consigned a box, at Birmingham, by the defendants, as common carriers, to J. West, 27 Great Winchester Street, London. The defendants found that no such person resided there; but, upon receiving a letter signed J. West, requesting that the box might be forwarded to a public-house at St. Alban's, they delivered it there to a person calling himself West, who showed that he had a knowledge of the contents of the box. That person having disappeared, and the box having been originally obtained of the plaintiff by fraud; held, the defendants were liable to him in *trover*. Also, that it was properly left to the jury to say, whether the defendants had delivered the box, according to the due course of their business as carriers. *Stephenson v. Hart*, 4 Bing. 476.

(b) And instructions to a jury, that they might find a conversion, if the defendant so managed as to interfere with the rights of the plaintiff to, and control over, the property, so that the plaintiff lost the same;

were held too indefinite for application by the jury, and to have a tendency to mislead them. 10 Cush. 416.

(c) Case on the custom and *trover* cannot be joined. *Dalston v. Janson*, 1 Ld. Raym. 58.

The following distinctions are made upon this subject:—

Trover lies against a carrier, for refusing to deliver goods given to him to carry; or an action on the case. But *trover* will not lie against him, for refusing to deliver goods given to his servant, unless he has been guilty of an actual conversion. *Taylor v. —*, 2 Ld. Raym. 792.

Trover does not lie against a carrier for negligence; as for losing a box, &c. But it lies for an actual wrong; as if he break it to take out goods, or sell it. And therefore denial is no evidence of a conversion, if the thing appears to have been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he refused to deliver it, it is good evidence of a conversion. 2 Salk. 655.

Trover may be maintained against a

§ 19. It is a question much discussed, whether the common-law liability of a carrier may be restricted by *express notice*, relating to the conditions or the extent of such liability; either publicly advertised, or embodied in an express agreement with the party whose goods are transported. (a)

§ 20. It is held, that, where a carrier gives notice to his customers, that he will not be accountable for any parcel, &c., of more than a certain value, unless entered as such and paid for accordingly; if a parcel be sent above that value, without being entered and paid for as such, and it be lost, the owner is not entitled to recover anything. And this, without reference to the high price which he agrees to pay for the carriage of the article; and although the carrier does not prove that the loss happened by any of those accidents, against which the law makes him an insurer.

common carrier, where the goods are lost by his act, though without any wrongful intent; as where he delivers them to the wrong person by mistake, or under a forged order. But if the goods are lost through the mere omission of the carrier, trover will not lie, even after demand and refusal; but only assumpsit or case. *Hawkins v. Hoffman*, 6 Hill, 586.

(a) As to the distinction between a contract and mere notice, and more particularly with reference to tickets, see *Nevins v. Bay State*, &c. 4 Bosw. 225; *Western*, &c. v. *Newhall*, 24 Ill. 466. See, also, *M'Andrew v. Electric*, &c. 33 Eng. L. & Eq. 180; *Hunt v. The Cleveland*, 6 M'Lean, 76; *Dorr v. N. J. &c. 4 Sandf.* 136; *Farmers', &c. v. Champlain*, &c. 23 Verm. 186; *Baxendale v. Hart*, 9 Eng. L. & Eq. 505; *Moore v. Evans*, 14 Barb. 524; *Moses v. Boston*, &c. 32 N. H. 523; *Newstadt v. Adams*, 5 Duer, 43; *Kimball v. Rutland*, &c. 26 Verm. 247; *Wilson v. Shulkin*, 6 Jones, 375.

As to the statute of 17 & 18 Vict. c. 31, § 7, by which the court must adjudge whether a notice is reasonable, see *M'Manus v. Lancashire*, &c. 4 H. & N. 327.

The plaintiff signed a receipt note for fish, delivered to the defendant for transportation, which contained the following provisions: "Fish will be conveyed only by special agreement and by particular trains mentioned in the time-bills of the company; they will not be responsible for loss of market, or other loss, &c., arising from delay of the train, exposure to weather, stowage, or any other cause other than gross neglect or fraud." The time-tables mentioned the trains in which fish would be carried, "subject in all cases to the im-

mediate convenience and arrangements of the company." These conditions were held to be reasonable, and the contract valid. *Beal v. South*, &c., 5 Hurl & Nor. 875.

A declaration, setting out merely an ordinary engagement of a common carrier, is not supported by proof of a contract, containing a special exception of the general liability. *Davidson v. Graham*, 2 Ohio, N. S. 131.

Circumstantial evidence is competent to prove, that a clause, by which the responsibility of the carrier was limited, was left in the bill of lading by mistake. The question of mistake is for the jury, and the burden of proof is on the party who alleged it. *Choateaux v. Leech*, 18 Penn. 224.

Where a special contract was made between a common carrier and his employer, and a loss has occurred, the burden of proof rests on the carrier, to show that the loss occurred from one of the causes excepted. *Davidson v. Graham*, 2 Ohio, N. S. 131.

A bill of lading for cotton shipped by a steamboat carrier contained the following exception:—"dangers of fire and navigation only excepted." Another bill contained the following exception:—"unavoidable accidents of navigation and fire excepted." The cotton was burnt on board the boat. Held, that "dangers of fire," and "unavoidable accidents of fire," meant the same thing, and that the term "fire" meant any fire, and was not restricted to fire originating from the furnace of the boat. *Swindler v. Hilliard*, 2 Rich. 286.

Nor is the carrier bound to prove that he used reasonable care.¹ And the same rule is held to apply to other limitations of responsibility; whether relating to the nature of the property, the mode of transportation, or the time of delivery. (a) Nor will a mere declaration of the plaintiff, made at the time of delivering the goods, that he will not be bound by such notice, vary the effect of it, unless unequivocally assented to by the carrier or his authorized agent.² Nor will such notice be defeated, by proof that the book-keeper, who received the goods, was conscious of or might have

¹ *Izett v. Mountain*, 4 E. 371; *Harris v. Packwood*, 3 Taunt. 264; *Stoddard v. Long Island*, &c. 5 Sandf. 180; *Marsh v. Horne*, 5 B. & C. 322; 2 J. P. Smith, 107; *Bignold v. Waterhouse*, 1 M. & S. 255; *Peck v. North*, &c. 1 Ell. B. & Ell. 958; *Ladue v. Griffith*, 25 N. Y. (11 Smith), 364.

² *Walker v. York*, &c. 22 Eng. L. & Eq. 315. See 2 J. P. Smith, 107.

(a) A horse was delivered to a railway company at N., to be conveyed to W. for the plaintiff. The person who delivered the horse signed a contract, agreeing to abide by a notice contained in it, that the directors would not be answerable for damage to horses thus conveyed. The horse reached the station at W. safely, but the company's servants there either forgot or did not notice that the horse had arrived, and, on the plaintiff's calling for it the next day, it was discovered in a horse-box on a siding, and found to have sustained serious injuries from cold, and from remaining in a confined position all night. Held, the company was protected from liability, under the 17 & 18 Vict. c. 31, § 7, by the signed contract. *Wise v. Great Western*, &c. 36 Eng. L. & Eq. 574.

The plaintiff, who had cattle conveyed by railway, received for them a ticket, which he signed, containing the terms on which the company carried the cattle. At the foot of the ticket was a clause: "N. B.— This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the company will not be liable for any injury or damage howsoever caused, and occurring to live stock of any description travelling upon the L. & Y. Railway, or in their vehicles." The plaintiff saw the cattle put into the truck. During the journey, some of the cattle became alarmed, broke out of the truck, and were injured. The truck was unfit and unsafe for the conveyance of cattle. Held, there was no implied stipulation that the truck should be fit for the conveyance of cattle, and the company were not liable. *Chippendale v. Lancashire*, &c. 7 Eng. L. & Eq. 395.

The plaintiff delivered to the defendants, a railroad, eighteen packages, described in

the receipt as furniture. On the receipt, under the head "conditions," were these words: "no claim for deficiency, damage, &c., will be allowed unless made in three days after the delivery of the goods; nor for loss unless made within seven days of the time of delivery, and the company will not be answerable for the loss or detention of goods which may be untrue or incorrectly described in the receiving note." The plaintiff signed the paper, without reading the conditions or knowing what they were. One of the packages contained clothes, but no claim was made for them until after more than seven days. Held, the conditions furnished a good defence. *Lewis v. Great*, &c. 5 Hurl. & Nor. 867.

The defendants, being common carriers, received property of the plaintiff, at New York, for transportation to Brighton Locks, and stored it in their warehouse, at Albany, on the pier. On the same day a fire broke out in Albany, a quarter of a mile distant. It was very dry, the wind blew with great violence, and the fire spread rapidly. The defendants' warehouse, and other warehouses on the pier, were consumed, and a portion of the property received of the plaintiff for transportation. When the goods were received at New York, the defendants gave a receipt, or shipping-bill, by which they agreed to transport the goods to Brighton Locks, "the danger of the lakes, of fire, and the acts of Providence excepted." Held, though the loss was not the result of inevitable accident, or the act of Providence, the defendants had a right to limit their liability, and, having expressly excepted the risk of fire, were not liable. *Parsons v. Monteath*, 13 Barb 353.

inferred their value.¹ Thus, where one delivered goods of above £5 value to common carriers to carry by the mail, paying no extra price; and by a public notice, which had before reached the owner, the carriers had declared that they would not be accountable for any package above the value of £5, unless insured and paid for accordingly: held, the goods having been sent by a different carriage and lost, the owner could not recover the value against the carriers; for the loss happened by no tortious conversion, nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such. Nor could he recover even the £5.²

§ 21. But, on the other hand, it has been held, that a common carrier cannot restrict his liability, as such, by a mere notice,³ (a) even if brought to the knowledge of the owner of the property; though his liability may be limited by express agreement.⁴ (b) And it has been held that the charter of a railroad is in the nature of a contract between the company and the state, permanently binding upon each; and the principal engagement on the part of the company is, that they shall become and continue to remain *common carriers*. Their liability as common carriers, consequent upon the contract, and the law appertaining thereto, becomes irrevocably fixed. They cannot alter or modify this liability by any stipulation or contract.⁵

§ 22. With regard to the general right of a carrier to be informed of the nature and value of the property intrusted to him; it is held, that a person delivering property, which requires peculiar care and attention for its safe transportation, to a common carrier, should make known to him the necessity, in order that proper precaution may be used;⁶ that he may require the value of the goods to be made known to him, and may take advantage of fraudulent acts of his employers.⁷ Thus if a box is delivered

¹ *Levi v. Waterhouse*, 1 Price, 280.

² *Nicholson v. Willan*, 5 E. 507; 2 J. P. Smith, 107.

³ *Fish v. Chapman*, 2 Kelly, 349. See *Hart v. Baxendale*, 6 Eng. L. & Eq. 468.

⁴ *Dorr v. The New Jersey, &c.* 1 Kern.

485; *Mercantile, &c. v. Chase*, 1 E. D. Smith, 115.

⁵ *Michigan, &c. v. Ward*, 2 Mich. 538; *contra*, 1 E. D. Smith, 115.

⁶ *Wilson v. Hamilton*, 4 Ohio, N. S. 722.

⁷ *Fish v. Chapman*, 2 Kelly, 349.

(a) The prevailing rule is, that a common carrier can only *limit*, but not wholly *avoid*, his common-law liability, by means of a public notice. 1 Pars. on Cont. 708, and n.; 2 Greenl. Ev. § 215.

(b) The agreement must be affirmatively proved. But it need not be in writing, and may be shown by usage. *American, &c. v. Moore*, 5 Mich. 368; *Cooper v. Berry*, 21 Geo. 526.

generally to a carrier, and he accepts it, he is answerable, though the party does not tell him there is money in it. But if the carrier asks, and the other answers in the negative; or if he accepts it conditionally, provided there is no money in it; the carrier is not liable.¹ So where the price of the carriage of money is greater than that of other goods, and the carrier is paid only for common goods, and is ignorant that the parcel contains money, he is not liable.² So it is held, that the reward ought to bear proportion to the risk. If money or jewels are sent, denying or concealing that it is money or jewels, the carrier is not answerable. As where notes to the amount of £100 were packed in an old mail-bag, and stuffed with hay, to give it a mean appearance, and in this state delivered to a carrier, and the bag arrived safe, but the notes were stolen.³ But, on the other hand, it is held, that, if A inclose money in a parcel of goods belonging to B, and B send the parcel to C, a common carrier, and the parcel be lost; A may maintain an action against C for the money, although he did not tell the carrier that money was contained in the parcel, and although he only received the rate of carriage for goods.⁴ So, to an action against the defendants, as common carriers, for refusing to carry a package of the plaintiff, the defendants pleaded, that, when the package was tendered, they requested the plaintiff to inform them of its contents, and that the plaintiff refused to do so, wherefore, and because the defendants did not know what the package contained, they refused to receive and carry it. Held, a bad plea; for a carrier has no general right, in every case, and under all circumstances, to be informed of the contents of packages tendered to him to be carried.⁵ So, in an old case, the plaintiff delivered to a carrier's porter a box, telling him that it contained a book and tobacco, when it also contained £100. Notwithstanding a direction from Chief Justice Coke, that, in consideration of the intended cheat upon the carrier, the jury might consider him in damages, they gave a verdict for £97, abating £3 for the carriage.⁶

§ 23. A special agreement, limiting the liability of common carriers, though general in its terms, does not release the carriers from losses resulting from negligence, more especially if gross, or

¹ Titchburne v. White, 1 Str. 145.

² Ibid. (note.)

³ Gibbon v. Paynton, 4 Burr. 2298.

⁴ Drinkwater v. Quenell, 7 Mod. 248.

⁵ Crouch v. London, &c. 25 Eng. L. & Eq. 287.

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⁶ Kenrig v. Eggleston, Aleyn, 93. (The reporter adds, *quod durum videbatur circumstantibus*. And see Gibbon v. Paynton, 4 Burr. 2301.)

from fraud.¹ Thus a carrier had given notice, that he would not be answerable for parcels of value, unless entered and paid for as such; and the plaintiffs, having notice, delivered a parcel, containing bank-notes to a large amount, without informing the carrier of its contents. The coach was left at midnight, standing for some time in the middle of a very wide street, with a porter, who was ordered to watch it; and during this time the parcel was stolen. Held, the two questions were properly left to the jury: first, whether the plaintiffs had been guilty of any unfair concealment; and, secondly, whether the carrier had been guilty of gross negligence.² So the plaintiffs sent goods packed in a box by the defendant's wagon. The box was placed with its lid outwards, at the tail of the wagon, which was left, during several hours in the night, standing in a road opposite an inn, where the wagoner stopped, without any person to watch it. The box was forced open and its contents abstracted. A notice was proved, limiting the carrier's responsibility to £5. Held, the carrier was guilty of gross negligence in leaving the wagon so exposed, and consequently liable for the loss.³ So, in an action against a coach-proprietor, for the loss of a trunk containing wearing apparel and jewels, the value of which was not disclosed by the plaintiff, nor asked by the defendant, the jury were directed to consider whether the defendant had been guilty of gross negligence, without reference to the non-disclosure of the value of the article. The jury having found for the plaintiff, the Court refused to set aside the verdict.⁴ So an exception of "the dangers of the lake," in a contract to convey goods from New York to Ogdensburg, does not exempt the carrier from liability for loss happening through want of ordinary care.⁵ So where a common carrier stated, in his bill of lading, that he would not be liable for breakages of goods in boxes; held, he was liable for such breakages caused by the negligence of his servants.⁶ So where a valuable bank-parcel, sent by a stage-coach, is lost, and it is proved, that, on arrival of the coach, the driver was in liquor,

¹ *Boswell v. Hudson*, &c. 5 Bosw. 699; *Ashmore v. Pennsylvania*, &c. 4 Dutch. 180; *Welsh v. Pittsburg*, &c. 10 Ohio (N. S.) 64; *Bissell v. N. Y.* &c. 29 Barb. 602; *Stoddard v. Long Island*, &c. 5 Sandf. 180; *Beck v. Evans*, 16 E. 244; *Pennsylvania, &c. v. McCloskey*, 23 Penn. 526; *Birkett v. Willan*, 2 B. & Ald. 356; *Macklin v. Waterhouse*, 2 Moo. & P. 319; *Duff v. Budd*, 3 Brod. & B. 177; *Davidson v. Gra-*

ham, 2 Ohio (N. S.), 131; *Goldley v. Pennsylvania*, &c. 30 Penn. 242.

² *Batson v. Donovan*, 4 B. & Ald. 21.

³ *Langley v. Brown*, 1 Moo. & P. 583.

⁴ *Brooke v. Pickwick*, 12 Moore, 447.

See *Bodenham v. Bennett*, 4 Price, 31; *Lowe v. Booth*, 13 Ib. 329.

⁵ *Slocum v. Fairchild*, 7 Hül, 292.

⁶ *Reno v. Hogan*, 12 B. Mon. 63.

and that the book-keeper, who saw the entry of it in the way-bill, thinking that the coachman (as was the custom) had the parcel about his person, did not ask him about it, or look into the coach for it; held, a loss arising from gross negligence, and that the proprietors were liable, notwithstanding the usual notice.¹ So; if notice is given by a steamboat, that it will not be liable for baggage unless checked; it is still liable for the loss of baggage delivered to an agent, but not checked, because the person intrusted with this duty was not present.² So a common carrier by water gave notice, that "he would not be responsible for any loss or damage to any cargo put on board his vessels, unless it happened by want of ordinary care and diligence in the master or crew, and then only to £10 per cent. on the amount of the loss, and not beyond the value of the vessel and the amount of her freight; and that, if any person desired to have goods carried free of any risk, in respect of loss or damage, whether by the act of God or otherwise, they must make a special agreement on payment of extra freight." (a) Held, the carrier was answerable for the whole of any loss or damage arising by his own default; as in case the vessel, at the time of loading, were leaky and not seaworthy; that the notice applied only to losses by reason of *the default of others*, not of himself.³ (b) So a

¹ Bodenham v. Bennett, 4 Price, 31.

² Lyon v. Mells, 1 J. P. Smith, 478. (a)

³ Freeman v. Newton, 3 E. D. Smith, 246.

(a) In the same case, elsewhere reported, it is held, that a carrier *by water*, contracting to carry goods for hire, impliedly promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage. And this, though he had given notice "that he would not be answerable for any damage unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay ten per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight." For a loss happening by the personal default of the carrier himself (such as not providing a sufficient vessel), is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c.; even if it were competent to a common carrier to exempt himself, by a special acceptance, from the responsibility cast upon him by the common law, for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies. Lyon v. Mells, 5 E. 428.

(b) In August, 1839, A, an express carrier, entered into a contract under seal with the defendants, proprietors of a line of steamboats running between New York and Stonington, by which, for a certain sum per month, during the year 1839, A was to have the privilege of transporting a crate of a specified size ("contents unknown,") on the boats; the crate and contents at all times to be at the risk of A, and the proprietors not in any event to be responsible either to A or his employers for the loss of any goods, &c., transported by A; and A to annex to his advertisements and receipts the following, viz: "Take notice: A is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to its contents at any time;" which clause was so annexed by A. This contract, having expired, was resumed for one year by parol agreement. The company gave notice by public

parcel, which, with its contents, exceeded £5 in value, having been delivered to A and B, common carriers, to be carried by their mail-coach, was accepted by them to be so carried, and was actually put into the mail, and carried by that conveyance a short distance; it was then taken out of the mail-coach by a servant of the carriers, and left to be forwarded by another coach, of which

advertisement, that all goods, specie, &c., shipped on their steamers must be at the risk of the owners; and inserted in their bills of lading an exception from their liability for the danger of fire, water, &c.; and a special notice that the company were to be held responsible for ordinary care and diligence only. In January, 1840, A received from a bank in Boston, checks and drafts on New York, on which he was to collect the specie in New York, and transmit the proceeds to Boston. On the 13th, of January, A shipped in his crate, on board the Lexington, one of the company's boats, a large amount of specie for the Boston bank. The boat was destroyed by fire on the passage, and the money lost. The bank filed a libel in admiralty against the defendants, to recover their money. It appeared, that one hundred and fifty bales of cotton were stowed on and along the boiler-deck and around the steam-chimney, within about one foot of the casing of the same, which was of pine, and within a few inches of the pipe, the cotton extending from the boiler to within a foot of the upper deck; that the fire was discovered soon after it broke out, and probably might have been extinguished with a few buckets of water had the boat then been stopped; instead of which the wheel was put hard a-port, in doing which the wheel-rope parted, and all control of the boat was lost; that the fire-engine on board, and the hose belonging to it, were stowed in different places in the boat, by reason of which it could not be brought into play; and that only two or three buckets could be found, and only one fitted with a heaving-line, the specie-boxes being emptied and used to carry water. By act of Congress (5 Sts. at Large, 306), such boat was required to be furnished with suction-hose and fire-engine, in good order, on every trip, and also with iron rods or chains instead of tiller-ropes. Held, the respondents were guilty of gross negligence; that neither their special contract with A, nor their public notices, exempted them from liability for gross negligence; that the libellants were entitled to recover; and that it was not necessary that the proceeding should be instituted in the name of A. *New Jersey, &c. v. Merchants', &c.* 6 How. U. S. 344.

It is held that, where there is a special acceptance of goods, the *onus* of showing, not only that the cause of the loss was within the terms of the exception, but also that there was no negligence, lies on the carrier. *Swindler v. Hilliard*, 2 Rich. 286. But see *Slocum v. Fairchild*, 7 Hill, 292; *Fish v. Chapman*, 2 Kelly, 349.

The plaintiffs declared against the defendants as common carriers, subject to the terms of a special notice, for the loss of a truss of silk, by their gross negligence, and the felonious acts of their servants. The defendants pleaded, except as to the gross negligence and felony, that the goods were such as are excepted in the carriers' act, and that the defendants did not declare their value. The plaintiffs new assigned, that they had brought action, for that the defendants' servants had feloniously stolen the goods. The new assignment was held bad on demurrer; and the plaintiffs were allowed to amend on payment of costs, and to reply that the goods were lost by the felony of the defendants' servants, through the gross negligence of the defendants. Held, also, that the allegation of gross negligence and felony in the declaration was surplusage, and that a replication of felony only without an allegation of gross negligence would have been bad. *Butt v. Great Western, &c.* 7 Eng. L. & Eq. 443.

In an action against a railway for the loss of a parcel, a replication, that the loss arose from the felonious acts of the defendants' servants, is a good answer to a plea founded upon the Carriers' Act, 11 Geo. IV. and 1 Will. IV. c. 68, § 1, that the value exceeded £10, and was not declared at the time of delivery to the carrier. *Metcalfe v. London, &c.* 4 C. B. (N. S.) 307.

The goods consisted of jewelry, &c. in a tin box, enclosed in a deal box fastened with a padlock. The box was brought to the station at Worthing, by a servant of a person in whose house the plaintiffs had lodged, to be forwarded to the plaintiffs in London. When the box was delivered to the plaintiffs there by a porter of the company, the outer box had been opened, and the tin box and its contents abstracted. Held, no evidence of a felony by the company's servants. *Id.*

A was one of the proprietors, but in which B had no concern; and the parcel was lost. The carriers had previously given the customary notice. Held, they were responsible.¹ So a parcel containing country banker's notes, of the value of £1300, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail-coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was lost. The carriers had previously given notice that they would not be answerable for any parcel above £5 in value, if lost or damaged, unless an insurance were paid. No insurance having been paid in this case, held, notwithstanding, that the carrier was responsible for the loss.² (a)

§ 24. A carrier's notice, limiting his liability, is not available, if it appears that it did not come to the knowledge of the customer.³ Thus notice is not binding upon a person unable to read;⁴ nor where the advantages of the mode of carriage were stated in large, and the conditions and exemptions in small, letters.⁵ And it is held that a mere general notice, when brought to the knowledge of the owner of the goods, will not avail, unless there is very clear proof that the owner expressly assented to it, as forming the basis of the contract; though a carrier may, by general notice, brought to the knowledge of the owner, limit his responsibility for carrying certain commodities beyond the line of

¹ *Garnett v. Willan*, 5 B. & Ald. 53.

² *Sleat v. Fagg*, *ib.* 342.

³ *Kerr v. Willan*, 6 M. & S. 150. See *Riley v. Horne*, 5 Bing. 217; 2 Moo. & P. 331; *Camden, &c. v. Baldauf*, 16 Penn. 67.

⁴ *Simons v. Great, &c.* 29 Law Times, 182; *Davis v. Willan*, 2 Stark. 279.

⁵ *Butler v. Heane*, 2 Campb. 415.

(a) The prevailing rule of law upon this general subject has been thus expressed: "The weight of authority seems to be in favor of the doctrine that in order to render the carrier liable, after such a notice, it is not necessary to prove a total abandonment of that character, as an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence" (or gross negligence, as sometimes explained), "and the effect of such notice is, that the carrier will not be responsible, at all events, unless he is paid a premium; but still he undertakes to carry, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage. And after such notice it may be that the

burden of proof of damage or loss by want of such care, would lie upon the plaintiff" *Per Parke, B. Wyld v. Pickford*, 8 M. & W. 443.

In a late case, the defendants undertook to transport goods from A to B, and "deliver to address," but the receipt, signed by them only, stated, that they are "not to be responsible except as forwarders." The goods being lost by the negligence of the employees of a steamboat, owned and controlled by other parties, but ordinarily used for transportation by the defendants; held, the managers and employees of the boat were, in reference to the owner of the goods, the managers, &c. of the defendants, and they were liable for the loss. *Hooper v. Wells* (California), Law Reg. Nov. 1865, p. 16.

his general business, or make his responsibility depend upon certain reasonable conditions.¹ Thus, in case of such notice, the carrier's agent told the female servant of the owner of a parcel, that it ought to be insured. Held, not sufficient.² So, where the plaintiff had for three years taken a newspaper in which the notice was advertised every week; the jury still having found a verdict for the plaintiff, the Court refused to grant a new trial.³ So, in an action against coach-proprietors for the loss of a parcel, the defendants proved a notice, exposed in a booking-office at Salisbury, kept by a person named Weeks. One Weeks was a defendant on the record; but no evidence was offered, that he was the Weeks above mentioned. Held, not a sufficient notice.⁴ But where an agent, employed by a commercial house in London to collect debts in the country, delivered a parcel containing bank-notes to a common carrier, to be forwarded to his principals in London, which parcel was lost; and the carriers had given notice, that they would not be accountable for parcels containing bank-notes; and the agent had no knowledge of such notice, but the principals had: held, it was their duty to have instructed their agent not to send bank-notes by that carrier, and the latter was not responsible.⁵

§ 25. A carrier may undoubtedly *waive* his rights arising from the notice referred to. But a carrier, who had given notice that he would not be liable for loss or damage, unless occasioned by the actual negligence of the master or mariners, was held not to have waived that notice, by having on former occasions made allowances to the plaintiffs for damage, without inquiring into the cause of such damage.⁶

§ 26. It is held, that the duty and liability of a common carrier may be modified by the particular *usage* of the carrier, without proof that the consignor had knowledge of such usage.⁷ (a)

¹ *Farmers', &c. v. Champlain, &c.* 23 Verm. 186.

² *Macklin v. Waterhouse*, 5 Bing. 212.

³ *Rowley v. Horne*, 10 Moore, 247; 3 Bing. 2.

⁴ *Macklin v. Waterhouse*, 2 Moo. & P. 319.

⁵ *Mayhew v. Eames*, 3 B. & C. 601; 5 Dowl. & R. 484.

⁶ *Evans v. Soule*, 2 M. & S. 1.

⁷ *Farmers', &c. v. Champlain, &c.* 18 Verm. 131.

(a) An accident having happened from lashing two flat-boats together, the carrier may show a custom so to navigate the river. *Johnson v. Lightsey*, 34 Ala. 169.

But it has been held, that a common car-

rier upon a canal cannot, in the absence of an express contract, limit his liability, by showing that, by a custom on the canal, carriers are not liable for losses resulting from the dangers of the navigation, from

§ 27. The liability of a common carrier of *passengers* is somewhat different from that of a carrier of merchandise. (a) It is said, "The carrier of goods has absolute control over them while they are in his hands; he can fasten them with ropes, or box them up, or put them under lock and key. But the carrier of passengers must leave to them some power of self-direction, some freedom of motion, some care of themselves."¹ Upon this ground is founded the well-established rule, that, instead of being liable for all losses, except those resulting from the act of God or the public enemy; in the case of common carriers of passengers, the highest degree of care and diligence, which a reasonable and cautious man would use, is required by law. This rule applies alike to the character of the vehicle, which must be *road-worthy*, the horses, which must be well broken and steady, the harness, the skill, caution, and sobriety of the driver, his knowledge of the road, watchfulness, and his conduct under every emergency or difficulty. The contract to carry passengers differs from that to carry freight only in this, that, in the latter case, the carrier is responsible at all

¹ 1 Pars. on Con. 695. See *M'Clenaghan v. Brock*, 5 Rich. 17; 23 Ill. 357; *Willis v. Long*, &c. 32 Barb. 398; *Wells*

v. New York, &c. 24 N. Y. (10 Smith) 181; *Perkins v. New York*, &c. Ib. 196.

fire, or from inevitable accident. *Coxe v. Heisley*, 19 Penn. 243.

The owners of a steamboat are not liable for the loss of money intrusted to the clerk by a passenger, unless a known and established usage for a steamboat to carry money for hire, on account of the owners, is shown. *Whitmore v. Steamboat Caroline*, 20 Mis. 513.

The question of custom is for the jury. *Huston v. Peters*, 1 Met. (Ky.) 558.

(b) A recent case decides the nature and requisites of this liability, in reference to the party upon whom a claim may be made. The defendant owned steamers running between New York and the eastern part of the transit route across the Isthmus of Nicaragua; also part of a line from the western point of that route to San Francisco. The transit company furnished him with passage-tickets across the isthmus, which he sold to passengers from New York, returning those he did not sell, and not acting as agent of the transit company. Over the door of his office he had a sign, headed "Vanderbilt's line between New York and San Francisco," signed "Allen, agent." The advertisement set forth the

route, and its advantages over others. The agent at the office sold the plaintiff three tickets for a gross sum, setting forth that he was to be carried to and across the isthmus, and from the western point of the transit to San Francisco in a certain vessel. A card signed by his name was also delivered, stating that passengers are carried without delay over the isthmus. The plaintiff was detained on the isthmus. Held, the jury were warranted in finding, that the defendant contracted as principal for prompt carriage across the isthmus, and that he was liable for the detention. *Quimby v. Vanderbilt*, 17 N. Y. 306.

In regard to the obligation of a carrier of passengers to carry *all persons* who apply; it is held, that the proprietor of a steamboat may exclude from the boat the agent of a rival line of stages to that, which by contract carries passengers for the boat, he being on board for the purpose of soliciting passengers. *Jencks v. Coleman* 2 Sumn. 221.

A carrier is bound to carry a passenger though he has contracted not to carry passengers coming by a particular line. *Bennett v. Dutton*, 10 N. H. 481.

events, except for the act of God and the public enemy.¹ (a) Thus passenger-carriers by stages are liable for injuries resulting even from the slightest negligence on the part of the coachman or proprietor of the stage. If the coach was upset by the running of the horses, and they ran off, not because they were accidentally frightened, but because the blocks were out of the brake, causing the stage to run upon them; and if the running off of the horses might have been prevented, if the horses had been properly harnessed, or if the utmost care and diligence of a cautious person had been used to secure the blocks in the brake: the proprietors are liable. Or if the quantity of baggage on the top of a stage-coach causes it to upset. And where a passenger is injured by the overturning of the coach, the *prima facie* presumption is, that it occurred by the negligence of the coachman, and the burden of proof is on the proprietors of the coach, to establish that there was no negligence whatsoever; and, although this presumption may be repelled, by proof that the coach was reasonably strong, with suitable harness, trappings, and equipments, of sufficient strength, and properly made, and that the driver was careful, of reasonable skill and good habits, with steady horses, not likely to endanger the safety of passengers; yet, if the running off of the horses caused the overturning of the coach, and such running off might have been arrested if the utmost care and diligence of very cautious persons had been exercised, the proprietors of the coach are liable.² Or if the superintendent of a stage allows a person other than the regular driver to drive it.³ It is said, the obligation of a stage-proprietor has respect to the team, the load, and the state of the road, as well as the manner of driving; therefore, evidence in reference to each of the above-mentioned points is admissible.⁴ And although the accident may have occurred

¹ Derwort v. Loomer, 21 Conn. 245; 11 Gratt. 697; 9 Bing. 457; 4 Gill, 406; 3 M'Lean, 22; 16 Verm. 566; Fuller v. Naugatuck, &c. 21 Conn. 557. See Great, &c. v. Harrison, 26 Eng. L. & Eq. 443; Nolton v. Western, &c. 15 N. Y. 444; Derby v. Philadelphia, &c. 14 How. 468, 483; Sales v. Western, &c. 4 Iowa, 547; Ed-

wards v. Lord, 49 Maine, 279; Clark v. Eighth, &c. 32 Barb. 657.

² Farish v. Reigle, 11 Gratt. 697; Boyce v. California, &c. 25 Cal. 467; Fairchild v. California, &c. 13 Cal. 599.

³ Tuller v. Talbot, 23 Ill. 357.

⁴ Taylor v. Day, 16 Verm. 566.

(a) Proof that the plaintiff was a passenger, of the accident and the injury, makes a *prima facie* case of negligence; and the burden of proof is on the defendant to rebut it. Galena, &c. v. Yarwood, 17 Ill. 509.

Running off the track of a railroad is

prima facie evidence of negligence. Yonge v. Kinney, 28 Geo. 111.

With more particular reference to railroads, see Buffit v. Troy, &c. 36 Barb. 420; Chicago, &c. v. Hazzard, 26 Ill. 373; Virginia, &c. v. Sanger, 15 Gratt. 230.

through the recklessness of the driver of another stage, who may be liable, and also his employers; yet, if there is any want of skill and prudence, in the driver of the stage to which the accident occurred, his principals are liable.¹ As for a crack in the iron axle of a car, though not discoverable by any practicable mode of examination.² And, in general, if an accident happen from a defect in the construction of the vehicle, the proprietor is held liable, although the defect be out of sight, and not discoverable upon ordinary examination.³

§ 27 *a*. But a less rigid rule has been adopted in some recent decisions. It is held, that, if an accident happens from a defect in the coach which might have been discovered by the most careful examination, the carrier is responsible. But it is otherwise, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by a sound judgment and the most vigilant oversight.⁴ So it is held, that the proprietor of a stage-coach is not liable, for an injury sustained by a passenger, in consequence of the accidental overturning of the coach, unless occasioned by the negligence or misconduct of the driver. Therefore, where the cause of the accident was the removal, since the coach had last passed, of one of two cottages, which had previously stood on an angle of the road, by which means the driver was deceived as to the course of the road (it being night, though moonlight), and the Judge told the jury, that, as the road was of sufficient width, and there was no obstruction or want of light, the coachman ought to have kept within its limits, and a verdict was found for the plaintiff; the Court granted a new trial, upon the ground that it should have been left to the jury to say, whether or not the driver had been guilty of negligence.⁵ (*a*)

¹ *Peck v. Neil*, 3 M'Lean, 22, 26.

² *Alden v. New York, &c.* 26 N. Y. (12 Smith), 102.

³ *Sharp v. Grey*, 9 Bing. 457; 2 Moo. & S. 620.

⁴ *Ingalls v. Bills*, 9 Met. 1. See *Ware v. Gay*, 11 Pick. 106; *Stokes v. Saltonstall*, 13 Pet. 181.

⁵ *Crofts v. Waterhouse*, 11 Moo. 133.

(*a*) The general rule does not apply to a mere private conveyance, without compensation. Thus the plaintiff employed the defendant to remove her goods in his cart for hire. With the consent of the defendant's carman, the plaintiff got on the cart with the goods, and on the way the cart broke down, and the plaintiff was seriously injured, and her goods broken. Held, the

plaintiff was not entitled to damages for the personal injury. *Lygo v. Newbold*, 24 Eng. L. & Eq. 507.

While the right to be carried by a common carrier of passengers is a right superior to the rules and regulations for the accommodation of passengers, their accommodation while being transported is subject to such general rules as the carrier may

§ 28. It has been formerly held, that a coachman is not liable for the loss of *goods* of his passenger, for the carriage of which he is not paid.¹ (a) But the contrary rule is now adopted, that, in a suit

¹ Upshare v. Aides, 1 Com. 24.

think proper to make, provided they are reasonable. Whether reasonable, is a question of law and fact, to be found by the jury, under instructions. Day v. Owen, 5 Mich. 520.

(a) The peculiar arrangements of railroad corporations have given rise to a new form or evidence of liability for baggage. A check is said to stand in the place of a bill of lading. Dill v. Railway Co. 7 Rich. 158. See Fleming v. Mills, 5 Mich. 420.

The delivery of a check is *prima facie* evidence that the company has the baggage. Davis v. Michigan, &c. 22 Ill. 278.

If, on a change of passage from one railroad to another, the agent of the road does not find the baggage which is checked, he should give immediate notice to the owner, or the latter company will be liable. Ibid.

Where different roads, forming a continuous line, run their cars over the whole line, sell through tickets, and check the baggage through; either company is liable for a loss. Hart v. Rensselaer, &c. 4 Seld. 37.

A railroad corporation created by the laws of Ohio, for the transportation of freight and passengers between Toledo and Cleveland, entered into an arrangement with two other railroad companies, by which passage tickets were sold and baggage checked over these roads to Buffalo. B purchased a passage ticket over all the roads from Toledo to Buffalo, and delivered her baggage to the defendant's baggage-agent, and received a check entitling her to receive such baggage at Buffalo. The cars were detained on the road, and did not arrive at Buffalo till late at night, and, other trains arriving at the same time, there was an unusual crowd of passengers and an accumulation of baggage. B did not claim her baggage that night, and the next morning it could not be found, and was supposed to have been destroyed by a fire which burnt the car-house and a large quantity of baggage during the night. Held, that B, under these circumstances, was not required to demand her baggage on the evening of its arrival at Buffalo, and that the defendant was responsible for the loss of it during the night. Cary v. Cleveland, &c. 29 Barb. 35. See Garvey v. Camden, &c. 1 Hilt. 280.

Held, the defendants had the power, un-

der their charter, to contract to carry a passenger and baggage beyond the State of Ohio, and the terminus of their own railroad, and were liable for the loss of baggage upon other railroads over which they had contracted to carry it. Ibid.

A passenger purchased a ticket for herself and her baggage from one who purported to be an agent for the sale of tickets, and the conductors accepted it as evidence of her right to ride, marked it, and finally took it, shortly before arrival, and demanded no other fare. Held, in a suit for loss of the baggage, sufficient proof of an undertaking to transport her goods over the road until the contrary appeared. Glasco v. New York, &c. 36 Barb. 557.

In a suit against the master of a steamer, for the value of a passenger's trunk, the only evidence was the deposition of one in whose care the plaintiff was at the time, that he caused the trunk to be placed on board the steamer, a short time before her departure. The court instructed the jury, that they must be satisfied that the trunk was delivered to the defendant, or to some officer of the boat authorized to receive it, on the part of the steamer. Held, a judgment for the plaintiff should not be reversed, on the ground that there was no sufficient evidence that the trunk was placed in the hands of the employees of the boat. Forbes v. Davis, 18 Tex. 268.

A railroad corporation will not be held liable for lost baggage, unless it is shown to have been in its possession, or that the company had contracted in some way to transport the baggage. Michigan, &c. v. Meyres, 21 Ill. 627.

Voluntary assistance by the agents of the company in looking for the baggage, or an offer, by way of gratuity, to pay on account of it, will not render the company liable. Ibid.

Evidence that the personal baggage of a passenger on a railroad, who took passage in July, had been seen at the place of his destination in November following, cannot be given as proof of proper transportation and delivery of such baggage in a suit against the company for the loss of it. Glasco v. N. Y. &c. 36 Barb. 557.

Where the company employ porters at their stations, to carry baggage to the carriages taken by passengers; the company are liable till delivery to the carriage. Richards v. London, &c. 7 Com. B 839

against stage-owners for loss of *baggage*, payment of the fare need not be expressly proved. It may be inferred. And even if not paid, the passenger is liable for it, and the owners are therefore bound to use ordinary diligence.¹ And a stage contractor is liable, as a common carrier, for the baggage of a passenger, within the weight which he is allowed to carry without paying freight; though no entry was made of the baggage on the way-bill kept by the stage contractor for his own use.²

§ 29. In regard to the kind, quantity, and value of articles, for which a carrier of passengers is responsible; by receiving the baggage of a traveller, including such articles as are necessary for his personal convenience, (a) who has engaged his passage, the carrier becomes immediately responsible for its safe delivery at the place of destination.³ Thus, where a carpenter took passage in a stage, and his trunk, containing clothing and tools to the value of \$55, was lost; held, the stage-proprietors were liable for all the contents of the trunk.⁴ So a common carrier of passengers is liable for the amount of money which is required for the whole journey contemplated, and allowing for accidents and contingencies.⁵ As, for the amount of \$300 in bank-bills, or for a pocket-pistol and a pair of duelling-pistols,⁶ contained in a carpet-bag of a passenger, which is stolen from the carrier,⁷ or for a revolver.⁸ But not for money beyond the amount above specified, or intended for other purposes, unless in case of gross negligence;⁹ and lia-

¹ *M'Gill v. Rowand*, 3 Barr. 451. See *Nordemeyer v. Loescher*, 1 Hilt. 499; *Dibble v. Brown*, 12 Geo. 217; *Wood v. Panama, &c.* 5 Duor. 193.

² *Peixotti v. McLaughlin*, 1 Strobh. 468.

³ *Woods v. Devin*, 13 Ill. 746; 9 Humph. 621.

⁴ *Porter v. Hildebrand*, 14 Penn. 129.

⁵ *Merrill v. Grinnell*, 30 N. Y. (3 Tiffa.) 594.

⁶ *Illinois, &c. v. Copeland*, 24 Ill. 332.

⁷ *Woods v. Devin*, 13 Ill. 746.

⁸ *Davis v. Michigan, &c.* 22 Ill. 278.

⁹ *Jordan v. Fall River, &c.* 5 Cush. 69; *Johnson v. Stone*, 11 Humph. 419; 22 Ill. 278.

See *Tower v. Utica, &c.* 7 Hill, 47; *East, &c. v. Lythgoe*, 10 Com. B. 726.

If a passenger delivers a package to be carried by the passenger train, without fraudulently representing it as baggage; he is liable to pay freight, and the railroad are responsible for its loss. *Butler v. Hudson, &c.* 3 E. D. Smith, 371.

In regard to the party who may bring an action for loss of baggage; an action lies in favor of a father for the loss of his son's baggage, while the son was employed on his own business, and was furnished by the father with a travelling trunk, clothing,

&c., for the purposes of the journey. *Grant v. Newton*, 1 E. D. Smith, 95.

Proprietors of a *mail-coach* line, used for carrying the mail, passengers, and their baggage, are not necessarily common carriers, as to articles not strictly within their line of business, but they become so by special contract or general course of business. *Powell v. Mills*, 30 Miss. 231.

(a) Personal use, comfort, instruction, amusement, or protection, having regard to the length and object of their journeys. *Parmelee v. Fischer*, 22 Ill. 212.

bility for money to any amount has been denied.¹ Nor for large sums of bullion, without paying freight therefor; nor for jewelry in the traveller's trunk, purchased by him and intended as presents for his friends;² nor for masonic regalia, or engravings.³ Nor will a jury be justified in allowing to the traveller a round sum for articles of jewelry, which he can neither describe nor identify otherwise than as "several articles of jewelry, being presents received, \$100."⁴ A notice, that a railroad corporation would not "be liable for the baggage of passengers beyond a certain amount, unless, &c.," printed on the back of the passage-ticket, and detached from what ordinarily contains all that is material to the passenger to know, does not raise a legal presumption that the party, *at the time of receiving the ticket*, and before the train leaves the station, had knowledge of the limitations or conditions; but it is a question for the jury.⁵ And even a public notice, disclaiming liability except on certain conditions, will not excuse the carrier in case of gross negligence. Thus, a common travelling trunk, of a large size, containing apparel and jewels, having been lost by the defendant, a carrier, either through his having omitted to place it on his coach, or having fastened it there insecurely; held, he was liable to make compensation to the owner; a gentleman travelling by his coach, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the carrier's office limiting his responsibility to five pounds in the absence of such disclosure, which notice the owner of the trunk, having been in the office, had an opportunity of seeing; that, under these circumstances, the question for the jury was, whether the carrier had been guilty of gross negligence, without reference to the nature of the article conveyed.⁶ (a)

¹ Grant v. Newton, 1 E. D. Smith, 95.

² Hutchings v. Western, &c. 25 Geo. 61.

³ Nevins v. Bay State, &c. 4 Bosw. 225.

⁴ 4 Bosw. 225.

⁵ Brown v. Eastern, &c. 11 Cush. 97.

⁶ Brooke v. Pickwick, 4 Bing. 218. See Pianciani v. London, &c. 36 Eng. L. & Eq. 418.

(a) In general, a notice of restricted liability, if clear and reasonable, will bind the passenger. Smith v. New York, &c. 29 Barb. 32; 24 Ill. 466; Nevins v. Bay, &c. 4 Bosw. 225.

The *onus* of showing a special contract restricting the carrier's liability, or a cause of loss for which he is not responsible, is upon the carrier. Matter printed on the

back of a railroad freight receipt is but a notice, not a part of the contract. Western, &c. v. Newhall, 24 Ill. 466.

Pursuant to the powers conferred upon them by a railway act, the company made certain regulations as to passengers' luggage; one, that they would not be responsible for articles not labelled and properly addressed; another, that all unclaimed

§ 29 *a*. In an action against a stage contractor for the loss of a trunk, slight and *prima facie* evidence is admissible, of the contents of the trunk.¹ And it is held, that, in a suit by a passenger against a common carrier, to recover the value of baggage taken from a trunk, broken open and despoiled while in the possession of the carrier, the plaintiff's own evidence is admissible to prove the contents of his trunk, and the value of the baggage taken from it; that, *from the necessity of the case*, the owner of a trunk, having first otherwise proved its delivery to the carrier and its loss, or the loss of articles stolen from it, is a competent witness in a suit brought by him against a common carrier for its loss, to prove the contents of the trunk, and their value. So also the wife of the owner.² But this rule will not be extended further, than to the proof of such articles as are commonly carried in a travelling trunk.³ Nor to the value of the articles in which the baggage is packed, or of other articles, the value of which may be established from description.⁴

§ 30. As in other cases, a party cannot recover for a loss of this

¹ Peixotti v. M'Laughlin, 1 Strobb. 468.

² 20 Ohio, 318.

³ Johnson v. Stone, 11 Humph. 419; Mad River, &c. v. Fulton, 20 Ohio, 318.

⁴ Davis v. Michigan, &c. 22 Ill. 278.

property found on their premises or in their carriages should be deposited in a place called the lost property office, and restored to the owner on payment of a fee of 6d. for each article. They also gave private instructions to their servants, that "no small articles, such as rugs, coats, &c., are to be labelled or placed in the luggage-van; the passengers must take charge of such articles themselves, or send them as booked parcels." The plaintiff, a passenger, required one of the company's porters to label and place in the luggage-van a package (within the stipulated weight and dimensions) consisting of wearing apparel, wrapped in a shawl fastened with a strap, and properly addressed. The porter refused to label the package, and insisted upon placing it in the carriage with the plaintiff. The plaintiff declined to allow this, unless at the company's risk. The package was left behind, and was afterwards taken to the lost property office, where it was detained, and 6d. demanded for its restoration. Held, the company were not justified in refusing to carry the package at their own risk, and were responsible for its detention. *Munster v. South Eastern, &c.* 4 C. B. (N. S.) 676.

In case of notice restricting liability to \$100, the carrier was held liable for a trunk, of over that value. *Nevins v. Bay, &c.* 4 Bosw. 225.

Railroads are under obligation to take, in a car annexed to the passenger train, any baggage which may be delivered to them by the passenger as his personal baggage, and to convey it to the point of destination, and there to deliver it to the passenger; whether or not such baggage exceed the amount which is allowed to pass free of charge, provided the surplus has been paid for as extra baggage. *Glasco v. New York, &c.* 36 Barb. 557.

Where one who has charge of cattle is travelling upon a railroad, under a free pass, which contains a stipulation, that, "by accepting or using it, he expressly releases the company in consideration of this pass, and the reduction of the price below the tariff rates, from all liability for injury to said stock," or "for injury to his person, or stock from any cause whatsoever;" and is injured without any wilful fault or gross negligence of the agents of the company the corporation will not be held liable to him for personal injury. *Boswell v. Hudson, &c.* 5 Bosw. 699.

description, where he has himself been in fault, or deviated from the ordinary course of dealing, in reference to the article lost, or himself taken special charge of it; more especially, if the property is rather of the nature of *freight* than *baggage*. Thus the plaintiff received a parcel from A, to book for London, at the office of the defendants, common carriers; but, instead thereof, put the parcel into his bag, intending to take it to London himself, and took a place in the defendant's coach. The bag being lost; held, the plaintiff could not recover.¹ So, where the plaintiff sent by a passenger train a quantity of merchandise, expecting to go himself in the same train, but did not; and the goods were lost without any gross negligence in the carrier, or any conversion by him; held, the carrier was not liable.² So, where an overcoat belonging to a passenger was not delivered to the defendants, a railroad company, but the passenger, having placed it on his seat, forgot to take it with him when he left, and it was afterwards stolen; held, the defendants were not liable.³ So, where an emigrant passenger in the defendant's ship, on a voyage from Liverpool to New York, took the exclusive possession of his trunk, taking it into the steerage, placing it under his bed, and fastening it to his berth with ropes; and during the voyage it was stolen: held, the owners of the ship were not liable for its value.⁴ And, as already stated, the implied obligation of a common carrier to carry the baggage of a passenger does not extend beyond ordinary baggage, or such as a traveller usually carries with him for his personal convenience; nor does it include more money than a reasonable amount to pay travelling expenses.⁵ Nor does the term "baggage" include *articles of merchandise*, not intended for personal use, which are in the nature of *baggage* or *freight*, but not paid for as such; such as "thirty-eight papers of new shoes, sixty pairs of stock for boys' shoes, and two papers of shoe-nails."⁶ The articles of property treated as baggage, under the decisions of different courts, are said to be clothing, money for travelling expenses, a few books for reading on the journey, a watch, a lady's jewelry for dressing, &c.⁷ But a common carrier who takes charge of a passenger's valise, as baggage, without notice that a large amount of gold is in the

¹ Miles v. Cattle, 6 Bing. 743.

² Collins v. Boston, &c. 10 Cush. 506.

³ Tower v. Utica, &c. 7 Hill, 47.

⁴ Cohen v. Frost, 2 Duer, 335.

⁵ Whitmore v. Steamboat Caroline, 20 Mis. 513.

⁶ Collins v. Boston, &c. 10 Cush. 506.

⁷ Doyle v. Kiser, 6 Ind. 242.

valise, is not liable for the loss of the gold, even though purloined by one of his agents.¹ (a)

§ 31. In reference to the defence, that the injury for which an action is brought occurred by the fault of the plaintiff himself; it is held, in the case of a railroad, that the law does not require of passengers in cars an exercise, in imminent peril, of all the presence of mind and care of a prudent and careful man; but the circumstances will be left to the jury, to say, from them, whether the party acted rashly and under undue apprehension of danger.² And, in an action for an injury occasioned by the negligence of the company's servants, it is not sufficient for the company to show, that the plaintiff was acting, at the time of the injury, in disobedience of a reasonable order for his safety; but it must also appear that such disobedience contributed to the injury.³ So it is held that the burden of proof, in an action by a ferry passenger for an injury sustained by him, is upon the defendant, to show want of ordinary care in the plaintiff.⁴ So a passenger on a stage-coach, may, in case of accident arising from the neglect of the carrier, and in the exercise of reasonable discretion, leap from it to save himself, and maintain an action against the carrier for injuries arising from such leap.⁵ So where a passenger, at the time of a collision, is in the baggage-car, with the knowledge of the conductor, he may recover, though he might or would not otherwise have been injured.⁶ But a railroad company is not liable for running over one walking on the track.⁷ (b)

¹ *Doyle v. Kyser*, 6 Ind. 242.

² *Galena, &c. v. Yarwood*, 17 Ill. 509.

³ *Lawrenceburgh, &c. v. Montgomery*, 7 Ind. 474.

⁴ *May v. Hanson*, 5 Cal. 360.

⁵ *Frink v. Potter*, 17 Ill. 406.

⁶ *Carroll v. N. New York, &c.* 1 Duer, 571. But see *Robertson v. N. York, &c.* 22 Barb. 91. See, also, *Pennsylvania, &c. v. M'Closkey*, 23 Penn. 526, 532.

⁷ *Brand v. Schenectady, &c.* 8 Barb. 368.

(a) It is not negligence in a traveller, to go to a hotel in the vicinity of a steamboat landing, and send a servant to the boat for his trunks. The carrier is bound to take care of the trunks for a reasonable time after arriving at the wharf. *Nevins v. Bay, &c.* 4 Bosw. 225.

(b) A delay probably injurious being shown, it is admissible to show that, before starting, the plaintiff consented to a delay, if necessary. *Johnson v. Lightsey*, 34 Ala. 169.

See, further, as to the defence of a passenger's own fault, *Havens v. Hartford, &c.*, 28 Conn. 69.

If the agents of a railroad use due care,

and the party injured by a collision is guilty of gross negligence, the company is not responsible. *Sims v. Macon, &c.* 28 Geo. 93.

The negligence of a slave, killed by sitting on the track, is the negligence of his owner. 28 Geo. 93.

The rule of a railroad, that no passenger shall stand on the platform while the cars are in motion, may be shown by parol. *Yonge v. Kinney*, 28 Geo. 111.

Riding on the tenders of a public sleigh is such negligence as will bar an action for injury sustained from other vehicles. *Spooner v. Brooklyn, &c.* 36 Barb. 217.

Where a railroad company provide a platform or other safe means of exit from their cars, at a station, it is the duty of

§ 32. *Ferrymen* are common carriers of all property, which they carry in their boats, whether accompanied by passengers or not. And it is held, that passengers on board a ferry-boat, and taking care of their own property, while acting in good faith, may be considered as agents of the ferryman, who will be liable therefor as a common carrier.¹ (a)

§ 33. A carrier has a *lien*, or may *detain* goods or baggage, for his

¹ Fisher v. Clisbee, 12 Ill. 344.

passengers to leave by the way provided, unless it be unsafe, or a justifying necessity exist to escape from peril or injury to life or limb; and it is error to admit evidence to be given to the jury, that persons were in the habit of getting out of the cars on the side opposite the platform. *Pennsylvania, &c. v. Zebe*, 37 Penn. 420.

A person, who obtrudes himself upon a locomotive or cars, cannot recover if he sustains injury. *Moss v. Johnson*, 22 Ill. 633.

The plaintiff, having purchased a through ticket, and having stopped at a way station, afterwards got into a caboose car, which was attached to a freight train, and in which passengers frequently rode, and the conductor, after discussion with him, concluded that his ticket allowed him to ride in the train, and suffered him to remain. In a suit for an injury received by an accident to the train, held, he must be conclusively presumed to be lawfully on the train. Also, that the company were estopped to say, that the caboose car was so evidently dangerous that it was negligence on the part of the passenger to ride therein. *Edgerton v. New York, &c.* 35 Barb. 193, 389. See *Barker v. Coffin*, 31 Barb. 556; *Barker v. N. Y. &c.* 24 N. Y. (10 Smith), 599.

If the stoppage of a train is so short, that a passenger has only time to go into one car before the train starts, he is not bound to look through the train while it is in motion, but may at once, if there is no seat ready for him to occupy in the car, stand upon the platform; and a statute against such mode of riding will not then protect the company in case of an injury to him. *Willis v. Long, &c.* 32 Barb. 398.

A passenger, who has refused to pay his fare, may resist an attempt to put him off the car in a manner dangerous to life or limb, and his proper resistance is no excuse for increased violence on the part of the conductor. And where the conductor put a passenger off the front end of a horse-car, while it was in motion, and, in so doing, the passenger resisting, threw him on the ground, where the ice and snow were so banked up that the man rolled under the

car and was killed; held, the act of the conductor was unnecessarily violent and dangerous, and the company liable. *Sanford v. Eighth, &c.* 23 N. Y. (9 Smith), 343.

Where it is not entirely clear, from the evidence, in an action by one injured by a collision, who was at the time riding in a public coach, that the negligence of the driver contributed to the injury; the question should be submitted to a jury. *Brown v. New York, &c.* 31 Barb. 385.

Where a person purchases a ticket, and takes his passage upon a train, and, after the train starts, gives up his ticket to the conductor; he cannot, at an intermediate station, by virtue of his subsisting contract, leave such train while in the reasonable performance of the contract, and claim a seat upon another train. *Cleveland, &c. v. Bartram*, 11 Ohio (N. S.), 457.

A railroad company has the right to prescribe reasonable conditions for the admittance of way passengers upon its freight trains; and payment of fare to its office-agents, or procuring a ticket prior to taking passage on such trains, is not an unreasonable condition. *Ib.*

An offer to pay the fare to an employee on the train, unauthorized to receive it, is not an offer to the company, and, in such case, does not entitle the person to a place on the freight train, as a passenger. *Ib.*

(a) A traveller, who drives his horse and wagon on board a ferry-boat, pays the usual toll for transportation, selects a place for himself, and retains the custody of his horse, without committing him to the care of the ferryman or his servants, or signifying any wish or purpose so to do, is bound to use ordinary care and diligence in the custody of his horse, to prevent the loss or injury of his property, by his horse taking fright or becoming restless. If the traveller neglects his duty in this respect, leaving his horse without any oversight, and the horse becomes frightened at the sound of the bell of the boat, springs against the chain stretched across the end of the boat, and attached to a hook, insufficient in strength for the purpose for which it is designed, breaks the hook, and throws him-

hire.¹ And this rule applies to railroads.² (a) And it was formerly held, that this might be done even against the true owner, although the goods were delivered to the carrier by a person who had no right to them.³ But even a statutory lien does not attach to a stolen horse.⁴ And the more recent doctrine is, that a common carrier, who innocently receives goods from a wrong-doer, without the consent of the owner, express or implied, has no lien upon them for their carriage against such owner,⁵ not even for freight which he has paid to a previous carrier, by whom the owner had directed them to be carried.⁶ So a carrier has no lien for freight upon goods received from a wharfinger, with whom they were deposited, with no authority to forward them.⁷ Nor for back freights.⁸ Nor on property of the United States.⁹ If the

¹ *Skinner v. Upshaw*, 2 Ld. Raym. 752. See *Hutchings v. Western*, &c. 25 Geo. 61; *Tooker v. Gormer*, 2 Hilt. 71; *Oppenheim v. Russell*, 3 B. & P. 42; *Steamboat, &c. v. Kraft*, 25 Mis. 76; *Langworthy v. New York, &c.* 2 E.D. Smith, 195; *Galena, &c. v. Rae*, 18 Ill. 488; *Hale v. Barrett*, 26 Ill. 195.

² *Galena, &c. v. Rae*, 18 Ill. 488.

³ *Yorke v. Grenaugh*, 2 Ld. Raym. 866.

⁴ *Gump v. Showatter*, 43 Penn. 507.

⁵ *Robinson v. Baker*, 5 Cush. 137. See *Angell*, on Car. § 363; *Fitch v. Newberry*, 1 Doug. 1; *Van Buskirk v. Purinton*, 2 Hall, 561.

⁶ *Stevens v. Boston, &c.*, 8 Gray, 262.

⁷ *Clark v. Lowell, &c.* 9 Gray, 231.

⁸ *Leonard v. Winslow*, 2 Grant, 139.

⁹ *Dufolt v. Gorman*, 1 Min. 301.

self and the wagon overboard, whereby the horse is drowned, and the merchandize in the wagon injured, without any fault on the part of the ferryman, when, by proper care and attention on the part of the traveller, the accident would not probably have occurred; the proprietors of the ferry are not responsible. *White v. Winnisimmet Co.* 7 Cush. 155.

The defendants, lessees of a ferry over a river, ran steamboats across, for passengers and goods. They also carried animals, but it was not their practice to take charge of the animals when on board. The plaintiff, having paid the usual fare, led his mare on board at one side of the river, and remained with her, until the steamboat reached the other side. For landing the passengers and animals, the defendants had provided a movable slip, leading from the boat to a landing barge. The slip had a hand-rail, which had been twice, recently, to the defendants' knowledge, broken by the pressure of a horse on landing; and in the handrail was an iron spike, which appeared whenever the rail gave way. The defendants had also been cautioned that the slip was unsafe. They, notwithstanding, continued to use the slip, leaving the broken rail slightly tied up, so that it appeared sound. Over this slip the plaintiff proceeded to lead his mare towards the shore,

but the mare pressed against the rail, the latter gave way, and the iron spike concealed in it injured her severely. Held, the defendants, as ferrymen, were bound to provide proper means for the embarkation and landing of the animals they carried for hire, and, although the mare was under the control and management of the plaintiff, they were liable for the injury. *Willoughby v. Horridge*, 16 Eng. L. & Eq. 437.

(a) This right does not deprive the general owner of the right to immediate possession *as against a wrong-doer*. It constitutes no bar to the possession of the property, unless set up by the authority of the carrier. *Ames v. Palmer*, 42 Maine, 197.

Several cargoes of coal, delivered by their owner upon the wharf of a railroad, were successively carried over the road, and at the place of destination unladen, assorted, and deposited by the owner's servants in bins on the land of the corporation, adjoining the owner's land, and portions were carried away and delivered to purchasers by the owner, from time to time, until he became insolvent, when the corporation forbade the taking away of any more coal without payment of the unpaid freight and wharfage. Held, the corporation had a lien upon the coal which remained, for the wharfage and freight of all the cargoes. *Lane v. Old Colony, &c.* 14 Gray, 143.

bailor or passenger pays the carrier in advance, and the carrier without the assent of the bailor employs another to perform the service, the latter must look to the carrier, and has no lien on the property of the bailor who has paid already. But if the bailor had not paid, the one who did the service would have a lien. It is for the bailor to prove payment in such case, as it will not be presumed.¹

§ 34. If a common carrier be induced to deliver goods to the consignee by a false and fraudulent promise of the latter, that he will pay the freight as soon as they are received; the delivery will not amount to a waiver of the carrier's lien, but he may disaffirm, and sue the consignee in replevin.² (a)

¹ Nordemeyer v. Loescher, 1 Hilt. 499.

² Bigelow v. Heaton, 6 Hill, 43.

(a) To the entire view of the subject of *bailment* now completed, we subjoin a brief notice of the *remedies* or *forms of action* pertaining to this liability.

As has been often mentioned in the course of the present work, to maintain trespass for taking and carrying away chattels, the plaintiff must have actual possession, or a right to immediate possession, at the time of the taking. Hence a bailor of chattels cannot maintain trespass against one who unlawfully takes them from the bailee during the bailment; and this rule holds, in case of an attachment of the chattels by an officer, as the property of a third person. *Muggridge v. Eveleth*, 9 Met. 233.

But, under some circumstances, the general owner or bailor may retain a sufficient possessory title, to support an action against one who wrongfully interferes with the property. Thus the *owner* of cotton is the proper person to bring an action against a warehouseman for failure to discharge his duty, and not a person who has a special lien on it for money advanced, and who controlled the shipment. *Scott v. Jester*, 8 English, 437.

If the bailee of a chattel, who has no authority, as against the bailor, to retain or dispose of it, mortgage it as a security for his own debt, and the mortgagee take possession under the mortgage; the bailor may maintain an action of trespass therefor against him, without a previous demand. *Stanley v. Gaylord*, 1 Cush. 536.

So a father, owning horses and carriages, put them into the possession of his son, to enable him to earn his livelihood, making no stipulation as to the time the son should keep them, and telling him that, whenever he (the father) should be put to any expense on account of them, he should take them away and sell them. The son established a livery-stable accordingly, paying

the expenses himself, and taking the profits to his own use, and on one occasion let a horse and carriage to go to a particular place; but the driver drove him to another place, where they were attached as the son's property, and the officer refused to give them up when demanded by the father. Held, the father had such a right of possession, as entitled him to maintain trover against the officer. *Morgan v. Ide*, 8 Cush. 420. See *Lewis v. Mobley*, 4 Dev. & B. 323.

So where the owner of beds let them for hire at a stipulated price by the month, payable in advance, and the hirer, within the month for which the last payment was made, abandoned the house in which he used the beds, leaving them there, and sending word to the owner that they were ready for him; held, the owner thereby became entitled to immediate possession of the beds, and might maintain trover therefor, before he received notice of the abandonment. *Hardy v. Reed*, 6 Cush. 252.

As to actions by a *bailee*, see *Wooley v. Edson*, 36 Verm. 214.

By a *carrier*, see *Merrick v. Brainard*, 38 Barb. 574.

The bailee of a sheriff, to whom the property of a third person is delivered, upon a contract to return it at the sale-day, has such a property in the thing bailed as will authorize him to sue a wrong-doer, for depriving him of the possession. (See chap. 30.) *Cox v. Easely*, 11 Ala. 362.

But a bailee, who holds property for the purpose of performing work upon it for a compensation, by which the property is not to be deprived of its original character, has only a special property in it; and if, after the completion of his work, he delivers it to a common carrier for the general owner he loses his special property, and can maintain no action against the carrier for the

loss of the goods. *Morse v. Androscoggin, &c.* 39 Maine, 235.

The bailee of personal property may, in an action against a stranger, recover damages commensurate with the injury done to the property, by such stranger, while in the bailee's possession. *Little v. Fossett*, 34 Maine, 545.

Where a wharfinger or warehouseman insures goods deposited with him, he is entitled, in case of loss, to recover the full value of the goods destroyed; but he is liable to the true owners for the excess of the money received beyond the amount of his own charges. *Waters v. Monarch, &c.* 34 Eng. L. & Eq. 116.

So, in trover by a bailee against the real owner, the plaintiff can recover the amount of his special property only; but, if the action is against a stranger, the full value of the article, holding the balance, beyond his special interest, in trust for the general owner, to whom he is responsible. *Benjamin v. Stremple*, 13 Ill. 466.

A bailee may, under some circumstances, not have such possession, as will give him the control of the property in reference to third persons. Thus, where the defendant hired a steamboat for an excursion to Richmond, the owner's captain navigating the vessel; held, the defendant had not such a possession, as to justify him in forcibly turning out a stranger, whom the captain had allowed to come on board. *Dean v. Hogg*, 10 Bing. 345.

The plaintiff delivered to A certain stock for clock-making, watches, watch materials, jewelry, &c., under an agreement in writing, that A should manufacture, repair, and put in order the property, and that he might sell it, or exchange it for certain other specified descriptions of property; and that the plaintiff would take back all the property, if requested, after three years, and before, if the parties could agree; or that, if the plaintiff should request, the whole property should be his at all times, and, if A should exchange the property for any description of property not authorized by the agreement, or should use any of the property, he should charge such property to himself, and become responsible to pay for the same; and that A would manufacture, repair, and dispose of the property as stip-

ulated; and that, having received pay for so doing, all the profit "should belong, together with the property, to the plaintiff." A received property under the contract, and was working and trading with the same; and, while he was so doing, the property was attached by the defendant as belonging to A. Held, the plaintiff had a right to immediate possession, which would sustain an action of trover. *Batchelder v. Warren*, 19 Verm. 371.

The plaintiff leased his only cow for one year, and, during that time, the defendant, a deputy sheriff, levied upon the cow by virtue of an execution against the plaintiff, but left her in the possession of the lessee until the expiration of the year, and then drove her away and sold her. Held, although the plaintiff might not have been able to sustain trespass for the levy within the year, yet the cow, after the determination of the bailment, was constructively in his possession, and the driving away of the cow was a fresh trespass, for which the plaintiff might maintain the action. *Keyes v. Howe*, 18 Verm. 411.

An action cannot be sustained against a mere *depository* of money, unless his situation has been changed from that of a depository to that of a debtor, either by a wrongful refusal to pay the money upon proper request, or by a wrongful appropriation of it. *Jackman v. Partridge*, 21 Verm. 558; *Phelps v. Bostwick*, 22 Barb. 314; *Montgomery v. Evans*, 8 Geo. 178.

A sends his horse, for the night, to B, who turns it out after dark into his pasture-field, adjoining to and separated from a field of C by a fence, which C was bound to repair. The horse, from the bad state of the fence, falls from one field into the other, and is killed. Held, that B, though a gratuitous bailee, might maintain an action against C, and recover the value of the horse. *Rooth v. Wilson*, 1 B. & Ald. 59.

The owner of a chattel may bring an action for an injury done to it, notwithstanding a settlement between the owner and the bailee, accompanied by an agreement that the latter may bring a suit in the name of the former, but at his own risk and expense and for his own benefit. Such agreement is not void for champerty. *Rindge v. Coleraine*, 11 Gray, 157.

CHAPTER XLVII.

LANDLORD AND TENANT.

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| 1. <i>Lease and mortgage</i> ; torts relating to. | 8. By third person against landlord or tenant. |
| 2. Actions by landlord and tenant against third persons. | 9. Forms of action by landlord and tenant against third persons — <i>trespass and case</i> . |
| 4. By tenant against landlord. | |

§ 1. It remains to give a brief view of the wrongs which may be committed in connection with two other private relations; viz., that of *landlord and tenant*, and that of *mortgagor and mortgagee*. Both these relations grow for the most part out of *written and sealed contracts or conveyances*; and the law pertaining to them is therefore for the most part foreign from the general subject of the present work, and requires only a proportionally general and comprehensive statement.

§ 2. A tenant and landlord may both maintain actions at the same time for injuries done to the estate; the former an action of trespass for the interruption of his possession and diminution of his profits; the latter an action on the case for the permanent injury to his property.¹ (a) Thus, where part of a lot of land under lease is taken by a city to widen a street, the lease is not thereby extinguished, nor the lessee discharged from the rent. But the lessor and lessee are each entitled to recover damages.²

¹ *George v. Fisk*, 32 N. H. 32; *Gourdier v. Cormack*, 2 E. D. Smith, 200; *Hardrop v. Gallagher*, Ib. 523; *Okeson v. Patterson*, 29 Penn. 22.

² *Parks v. Boston*, 15 Pick. 198.

(a) In an action by a tenant for injuries to his possession, he may recover the necessary expense of restoring the building to a condition as beneficial as its former one; but not, in general, a sum exceeding the value of his term, taking into consideration the rent reserved. But if he is bound to repair, and restore the premises in as good condition as when leased, he may recover a sum sufficient for this purpose. *Walter v. Post*, 4 Abbott, Pr. 382.

An action for quarrying and removing

stone, soil, &c., from the bed of a turnpike-road, for the purpose of repairing the road, may be maintained by the owners of the reversion in fee of the land upon which the road is built; but for the injury to the possession, occasioned by placing quarried stone upon land adjacent to the road, and afterwards removing the same, the action must be by the tenant in possession of the land, and the (Kentucky) act of 1854 does not apply. *Kelly v. Donahoe*, 2 Met. (Ky.) 492.

§ 3. But where the lessee of a store is prohibited, under certain penalties, by the lease, from making any alterations in the store without consent of the lessor, and, subsequently to the execution of the lease, the street is widened by the city; the city is not responsible to the lessee for any damage occasioned by a delay, on the part of the lessor, to give his consent to the alterations rendered necessary by the widening of the street.¹ And, in an action by the lessee against the city, evidence that his sales were less during the time when the street, as widened, was being fitted for use, than in the corresponding season of the next year after the alteration had been completed, is not admissible, unless connected with other evidence, that the diminution of business was occasioned by the operation of widening the street.² And a city or town is not responsible for the inconvenience and loss of business occasioned to the abutters on a street, by incumbrances and obstructions placed in the street for the purpose of repairing it, or by opening a common sewer in the street.³

§ 3 a. A rented the premises in question, and sold his interest to the plaintiff, the agent of the owners recognizing the plaintiff as their tenant, previous to the time when the defendant entered. Held, the plaintiff was entitled to possession at that time, and if the defendant, while in possession, rendered the premises untenable, he was entitled to recover in an action of trespass what it would cost to repair.⁴

§ 3 b. The reversioner of a leased house and land may maintain an action to recover damages for breaking and entering the premises, removing a blind, and breaking a pane of glass in a window.⁵

§ 3 c. If a lessee for years of a farm and stock sells part of the stock contrary to the terms of the lease, the purchaser, after the termination of the lease by agreement of the parties thereto, though within the term named therein, is liable to the lessor in trover for the stock so sold.⁶

§ 3 d. A tenant at will, after the determination of his tenancy, by a conveyance from the owner of the premises, cannot maintain an action of tort for breaking and entering his close, against the purchaser, for entering, and removing his furniture, and ejecting

¹ *Brooks v. Boston*, 19 Pick. 174.

² *Ibid.*

³ *Ibid.*

⁴ *Burt v. Warne*, 31 Mis. 296.

⁵ *Cushing v. Kenfield*, 5 Allen, 307.

⁶ *Billings v. Tucker*, 6 Gray, 368.

his family therefrom, nor can he inquire into the consideration of the deed of conveyance.¹

§ 4. A tenant may maintain trespass *qu. claus.* against the landlord for any interference with the leased premises in violation of the lease. Thus a tenant from year to year, being desirous of letting his house for a quarter, quits and leaves it locked up, with authority to his landlord to let it during his absence, and for that purpose leaves the key with a neighbor. An opportunity of letting offers, but, the person who has the key having absconded, the landlord enters, by placing a ladder against the house, and raising the first floor window, and, after showing the house, leaves it in the same state as before. The house is afterwards broken open by persons unknown, and some of the tenant's furniture and wearing apparel is stolen. Trespass is brought against the landlord for breaking and entering the house, and leaving it insecure, *per quod* the tenant's furniture and wearing apparel were stolen. Held, a plea of leave and license was no answer to the action.² So a tenant at will, whose estate has not been legally determined, may maintain trespass *qu. claus.* against his landlord, for entering and cutting off a pump upon the premises.³ So if a lease be made, with exception of the trees, and a power reserved to the lessor to enter and cut them down, he may assign this power to another person; but if it be not properly pursued, the lessee may maintain trespass both against the lessor and his assignee.⁴ So under a statute of *forcible entry*, &c., if a tenant at will of a dwelling-house hold over his term, and thereupon, after due notice to quit, the landlord forcibly enter and eject him, his family, and effects from the house; the entry is unlawful, and the tenant may recover in trespass *qu. claus.*; though he had agreed to leave by a certain day, and that, if he did not leave, the landlord might put out him and his effects in any way he chose.⁵ So a lessee, stipulating to pay and deliver one third of the crop for rent, may maintain trespass against his landlord for entering and taking it.⁶ So an action lies for detaining goods taken, under a distress for rent, after a sufficient tender made before impounding.⁷ So where one has rented a place to another to make a crop, in which they are to go halves,

¹ Curtis v. Galvin, 1 Allen, 215.

² Ancaster v. Milling, 2 Dowl. & Ry. 714.

³ Dickinson v. Goodspeed, 8 Cush. 119.

⁴ Warren v. Arthur, 2 Mod. 317.

⁵ Dustin v. Cowdry, 23 Verm. 631.

⁶ Blake v. Coats, 3 Greene (Iowa), 548.

⁷ Loring v. Warburton, 1 Ell. B. & E. 507.

the owner furnishing a horse, this is a *tenancy*; and the tenant may bring trespass against his landlord for forcibly entering and breaking his close.¹ (a)

§ 5. But where a tenant at will of a house remains in possession, after refusing or neglecting to pay the rent that is due, and after the landlord has given him in writing the legal notice to quit; he cannot maintain trespass against the landlord for entering the house with force, and taking away the windows and inside doors thereof.² Nor can such action be maintained, where, a tenant having omitted to deliver up possession when his term had expired, after a regular notice to quit, the landlord, in his absence, broke open the door, and resumed possession; though some articles of furniture remained.³ And, in general, an action of tort for breaking and entering the plaintiff's close does not lie in favor of a tenant by sufferance against his landlord.⁴

§ 6. The landlord may also be liable to an *action on the case*. But where a tenant for a year brings an action on the case against his landlord, during the term, for obstructing lights; damages can only be given for the time before commencement of the suit, and not for the whole term.⁵ And a tenant cannot recover damages from his landlord, caused by a nuisance on the demised premises, unless he alleges and proves that the defendant is liable on some contract, or that the nuisance arises from some act with which he is connected.⁶

§ 7. A lessor is not liable, either as partner, principal, or master, for the torts of the lessee or his servants.⁷ And, on the other hand, a tenant is not liable in trespass to his sub-tenant for an interference by the landlord with the possession of such sub-tenant. The landlord alone is liable.⁸

¹ Hatchell v. Kimbrough, 4 Jones, 163.

² Meader v. Stone, 7 Met. 147.

³ Turner v. Meymott, 7 Moore, 574;
1 Bing. 158.

⁴ Moore v. Mason, 1 Allen, 406.

⁵ Blunt v. McCormick, 3 Denio, 283.

⁶ Vai v. Weld, 17 Mis. 232.

⁷ Norton v. Wiswall, 26 Barb. 618.

⁸ Luckey v. Frantzkee, 1 E. D. Smith,
47.

(a) Landlord and tenant are tenants in common of crops raised on shares, until a division is made. The tenant has a right, after he has quitted the possession, to a reasonable ingress upon the land, to remove his goods and utensils. Trespass does not lie against him by the landlord, though he carries away the crops of which they are co-tenants. Daniels v. Brown, 34 N. H. 454.

The right to enter for this purpose is derived from a license in law; and if the right is abused by a resort to violence to effect the object, the tenant becomes a trespasser *ab initio*, and liable not only for the entry, but for the landlord's share of the crop carried away. Ibid.

The damages for the crops must be limited to the value of the landlord's share. Ibid.

the act of his servant. As where the clerk of the lessee of a store wantonly fired a can of powder, and blew up the store.¹ So a lessor may sue in case for injury to his reversion, though the injury is the working a mine, contrary to the terms of the lessee's covenant, and for the committing of which an action on the covenant would lie.² So it is held, that an action on the case will lie by a lessee for years against his under-lessee, for so negligently keeping his fire that the premises were burned down; because such lessee is liable to the first lessor.³

§ 11. In regard to actions by landlords against third persons; to entitle a reversioner to maintain an action for a nuisance, whereby his reversion is injured, the injury must be of such a permanent nature as to affect the reversion. Thus the landlord of a house cannot maintain an action for the noise made by the defendant's hammering in adjoining premises during the tenancy, although less rent was paid by the tenant in consequence of such noise.⁴ So making fires and causing smoke to issue from a chimney, the erection of the chimney itself not being a nuisance, but only the use made of it, is not ground for an action by the reversioner of adjoining premises, although his tenants have given notice to quit in consequence, and the premises would sell for less if the nuisance were continued.⁵ So a reversioner of land leased cannot maintain an action on the case against a stranger, for merely entering on his land, though in the exercise of an alleged right of way.⁶ Nor can a lessor at will maintain an action against a third person, for entering on the land, demanding rent of the lessee, and leasing the land to him; no actual damage being done thereby to the reversion.⁷ But where the plaintiff demised a cottage without exception of mines; it was held, that he might sue in case, for an injury occasioned to the cottage by a stranger who had excavated coal, though it was not clear whether the injury resulted from excavation under the cottage, or under an adjoining house in the occupation of the plaintiff.⁸ So the building a roof, with eaves which discharge rain-water by a spout into adjoining leased

¹ *Mason v. Stiles*, 21 *Mis.* 374.

² *Marker v. Kenrick*, 14 *Eng. L. & Eq.* 320.

³ *Cudlip v. Rundall*, 4 *Mod.* 9; *Hicks v. Downing*, 1 *Ld. Raym.* 99.

⁴ *Mumford v. Oxford, &c.* 36 *Eng. L. & Eq.* 530.

⁵ *Simpson v. Savage*, 37 *Ib.* 374.

⁶ *Baxter v. Taylor*, 4 *B. & Ad.* 72; 1 *Nev. & M.* 11.

⁷ *French v. Fuller*, 23 *Pick.* 104.

⁸ *Raine v. Alderson*, 4 *Bing. N. R.* 702

premises, is an injury for which the landlord of such premises may recover, if there is a damage to the reversion.¹ So, in case for obstructing the plaintiff's mills, the declaration alleged, that the mills were leased, and that in consequence of the obstruction the tenants had threatened to quit, and the plaintiff had, therefore, been constrained to make a reduction in the rents. Held, a sufficient cause of action, and that a recovery would be a bar to any action by the tenants for the same obstruction.²

§ 12. Declaration in case, alleging that the plaintiff was reversioner of a house, &c., then occupied by his tenant A; that the defendant was in the occupation of a close near to the house, &c., in which was a watercourse; that the defendant, by reason of his possession of the close, ought to have scoured, &c., to prevent the water from being obstructed, and from running out of the watercourse unto, into, and under the house, &c. But the defendant permitted the watercourse to be obstructed, so that the water was penned back, and ran into and damaged the house, to the injury of the plaintiff's reversion. Plea, that a wall, parcel of the plaintiff's premises, was situate near the watercourse and the defendant's close; and, by reason of the wall's being, through the neglect of A, ruinous, &c., part of the wall, near to the watercourse, fell down, and rubbish, &c., being part of the materials, fell into the watercourse, and the same was thereby choked up; and the water, for a short time, unavoidably was penned back, &c., and ran out, as in the declaration mentioned; that the defendant, in a reasonable time after he had notice that the watercourse was so choked up, &c., and before action brought, cleansed out the same, so that the water flowed as it ought to do. Held, on general demurrer, that the alleged default of the tenant was no answer, the plea not showing that the owners and occupiers of the estate for the time being were bound to repair the wall. Also, that the defendant could not excuse himself, by averring that he repaired as soon as he had notice of the injury, since he became liable when the injury occurred.³

§ 13. But a lessor cannot maintain trespass *qu. claus.*, while there is a tenant in possession.⁴ Where real property is in the possession of a lessee other than a tenant at will, case, and not

¹ Tucker v. Newman, 11 Ad. & Ell. 40.

² Baker v. Sanderson, 3 Pick. 348.

³ Bell v. Twentyman, 1 Ad. & Ell. N. S. 766.

⁴ Roussin v. Benton, 6 Mis. 592.

trespass, is the proper form of action to be brought by the landlord, for an injury by a stranger affecting the inheritance; even where trespass would be the proper remedy, if the landlord were himself in possession.¹ Thus trespass for an injury to timber, during the possession of the lessee for years, cannot be maintained by the landlord against a stranger, although the lessee was restricted from cutting the timber. Otherwise, if the timber is expressly reserved in the lease.² And it is held that the owner of land cannot maintain trespass *qu. claus.* for an injury to premises in possession even of a tenant at will, unless the freehold or some fixture on it is injured.³ So in order to maintain *trover*, the plaintiff must have the right of possession as well as of property. Therefore where furniture, leased with a house, was wrongfully taken in execution by the sheriff; held, the landlord could not maintain *trover* pending the lease.⁴

§ 14. But it has been held that trespass *qu. claus.* lies for the owner of land in the occupation of his tenant at will, where the injury affects the permanent value of the property; as the cutting down of trees, destruction of buildings, &c.⁵ And where the owner of a mill lets it to one who is to receive part of the tolls, the owner himself must sue for trespass.⁶ So where the owner of a building leases at will the rooms therein, though they constitute the chief part of the building, he still retains such possession as will maintain trespass for the destruction of the building, or any injury which renders it untenable.⁷

¹ *Lienow v. Ritchie*, 8 Pick. 235.

² *Greber v. Kleckner*, 2 Barr, 289.

³ *Lyford v. Toothaker*, 39 Maine, 28.

⁴ *Gordon v. Harper*, 7 T. R. 9.

⁵ *Starr v. Jackson*, 11 Mass. 519.

⁶ *Wilson v. Crosby*, Wright, 288.

⁷ *Curtiss v. Hoyt*, 19 Conn. 154.

CHAPTER XLVIII.

MORTGAGE.

§ 1. WITH reference to torts in connection with the relation of *mortgagor and mortgagee*; it has been held that a mortgagee cannot maintain an action for waste against the mortgagor, at least until after the forfeiture of the mortgage.¹ So the treble damages, provided for by the Massachusetts Revised Statutes, c. 105, § 9, where a tenant in possession of land, for the recovery of which an action is pending against him, commits waste thereon during the pendency of the action, can only be recovered in the manner provided by the statute, and cannot be made an item of charge by mortgagor against mortgagee, in an account stated between them by a master in chancery, or on a bill in equity to redeem.² But a mortgagee may maintain an action on the case against the mortgagor, or a person claiming under him, for waste committed upon the mortgaged premises after forfeiture of the mortgage, and after a decree for sale of the premises, where the mortgagor is insolvent, and the premises are a slender security for the debt.³ And it is held that an action on the case will lie, by the holder of a mortgage on lands, against the mortgagor or the purchaser from him of the equity of redemption, for acts of waste, committed with a knowledge that the value of the security will be injured thereby, the premises being a scanty security for the debt. As where the defendant, who had purchased under the mortgagor, took away fences, and cut down and carried away valuable timber, with a knowledge of the existence of the mortgage, and the insolvency of the mortgagor. Nor is it necessary to show that the primary motive of the defendant was to injure the plaintiff's security, if done with a full knowledge of the circumstances, although primarily with a view to his own emolument.⁴

¹ *Peterson v. Clark*, 15 Johns. 205.

² *Boston Iron Co. v. King*, 2 Cush. 400.

³ *Southworth v. Van Pelt*, 3 Barb. 347.

⁴ *Van Pelt v. McGraw*, 4 Comst. 110.

§ 2. After sale of mortgaged premises under decree and execution, the mortgagor in possession will be *restrained* from committing waste.¹ And, in general, a mortgagee is entitled to an injunction, to restrain the mortgagor from the commission of waste, by which the mortgage security is in danger of being reduced in value below the amount of the mortgage debt. And the Court will not only restrain waste, but will, if the bill be brought for that purpose, proceed and take an account of the waste actually committed, and decree satisfaction therefor; not only against the mortgagor, but also against those not connected with the mortgage title, who have committed waste by license from him, after condition broken, and with full knowledge of the respective rights of the mortgagor and mortgagee.²

§ 3. A mortgagor in possession may maintain trespass *qu. claus.*³ So, in trover, the defendant cannot justify, by showing a mortgage from the plaintiff to a third person.⁴ But where the plaintiff mortgaged personal property, and, before he registered the mortgage, which by law was necessary to pass the title, the property was sold on execution against the mortgagee; held, the plaintiff could not maintain trover against the officer; but, as the property was sold without an order of court, he could have a special action for the injury to his right of property.⁵

§ 4. In regard to the right of action of a mortgagee, a mortgagee has no property in trees cut down by a mortgagor in possession, so as to maintain trover against him.⁶ But a mortgagee not in actual possession may, after condition broken, maintain trespass against the mortgagor, for cutting and carrying to market timber trees standing on the premises.⁷ And the mortgagee of timber lands may maintain trespass or trover against any one who shall cut and carry away the timber, or afterwards convert it to his own use, without authority from such mortgagee, although under a license from the mortgagor given after the mortgage.⁸ So a mortgage of goods vests the general property in the mortgagee, who has the immediate right of possession, unless there is an express stipulation to the contrary, and may maintain trespass against him who

¹ Phoenix v. Clark, 2 Halst. Ch. 447.

² Hastings v. Perry, 20 Verm. 272. See Johnson v. White, 11 Barb. 194.

³ Earle v. Hall, 2 Met. 353, 356.

⁴ Gaines v. Briggs, 4 Eng. 46.

⁵ Murchison v. White, 8 Ired. 52.

⁶ Peterson v. Clark, 15 Johns. 205.

⁷ Page v. Robinson, 10 Cush. 99. See Harris v. Haynes, 34 Verm. 220.

⁸ Frothingham v. M'Kusick, 11 Shep. 403.

wrongfully takes the goods away, although he has not given notice to the mortgagor or person in possession, pursuant to (Mass.) Stat. 1843, c. 72, § 1, of his intention to foreclose the mortgage.¹ So although the trespass be committed before the debt becomes due.² So a mortgagee of a building, standing on land of a third person, may maintain trespass against a stranger who pulls down and carries away the building, the building being occupied at the time of the trespass, and the mortgagee not having taken actual possession.³

§ 5. Where a person in possession of mortgaged premises, claiming under the mortgagor, refuses to yield possession to the mortgagee, upon his entry after condition broken, the mortgagee may maintain trespass against him for mesne profits, although the entry may not have been sufficient under the statute for the purpose of foreclosure.⁴

§ 5 a. The mortgagee of personal property may bring an action for damages to his reversionary interest, although he has not a right to immediate possession.⁵

§ 6. A stipulation in a mortgage of personal property, that the mortgagor shall remain in possession until breach of condition, is personal to the mortgagor, and cannot be assigned or transferred. The mortgagee may bring trover before breach of condition, against a purchaser from the mortgagor.⁶

§ 7. If, after any default in payment of notes, maturing at different dates, to secure which a mortgage has been given, the mortgagor mortgage the goods to a third person, with notice; such third person, if he take and convert the goods to his own use, is liable for them in trover to the first mortgagee.⁷ So a person who aids the mortgagor of personal property, in carrying it away and concealing it, is liable to the mortgagee in trover, even though he was ignorant of the mortgage.⁸ So where the mortgagor of goods, of which the mortgagee had the right of immediate possession, by a mortgage duly recorded, induced the mortgagee, by false and fraudulent representations, to allow the goods to remain in his possession for a certain period, during which the mortgagor, for the purpose of cheating and defrauding the mortgagee, sent the goods to an auctioneer, by whom they were sold and the proceeds

¹ Brackett v. Ballard, 12 Met. 308.

² Woodruff v. Halsey, 8 Pick. 333.

³ Ibid.

⁴ Northampton, &c. v. Ames, 8 Met. 1.

⁵ Googins v. Gilmore, 47 Maine, 9.

⁶ Bellune v. Wallace, 2 Rich. 80.

⁷ Burton v. Tannehill, 6 Blackf. 470.

See Wolf v. Farrell, 3 Brev. 68; Coles v. Clarke, 3 Cush. 399.

⁸ Flanders v. Colby, 8 Fost. 34.

paid over to the mortgagor; it was held that the mortgagee might maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud of the mortgagor, and had no knowledge in fact of the existence of the mortgage.¹ So a purchaser of land gave a promissory note, secured by mortgage thereof, for the purchase money, and entered into possession; and afterwards, by agreement of parties, reciting the settlement of all accounts with the mortgagor, the note, before payment of any part of it, was given up to be cancelled, and the land was released to the mortgagee. Held, this was no bar to an action of trover by the mortgagee against a purchaser from the mortgagor, before the execution of the agreement, with notice, of property attached to the realty.² But where the mortgagor of personal property, in actual possession, makes an illegal sale to a third person, a servant of the purchaser, who merely carries the goods from one shop to the other, without any knowledge of the mortgage, or of any claims upon the property, but those of the seller and purchaser, is not liable to the mortgagee in trover.³ So after a mortgage of goods had been put on record, the mortgagor, who remained in possession, assigned the goods, and aided the assignee in clandestinely removing them out of the State. In trover by the mortgagee against the assignee, and one B, who at the request of the mortgagor carried away a portion of the goods and delivered them to the assignee, it was held, that, if B did not act in concert with the assignee, or with intent to deprive the plaintiff of his property, the mere removal of a portion of the goods from one place to another, at the request of the mortgagor, was not of itself a conversion, because the mortgagor, having rightful possession, might lawfully direct such removal, if it was not done with an intent to injure the mortgagee and deprive him of his property; or, if the mortgagor had such intent and was confederate with the assignee, yet, if B did not know it or assent to it, his act done at the request of the mortgagor would not be a conversion.⁴

§ 7 a. It is held that no action will lie by the holder of a mortgage against another for *negligently* injuring the mortgaged premises, by which the plaintiff has lost his security.⁵ But an action on the case will lie against one who, *with intent to defraud the plaintiff*, has

¹ Coles v. Clarke, 3 Cush. 399.

² Hemonway v. Bassett, 13 Gray, 378.

³ Burditt v. Hunt, 12 Shep. 419.

⁴ Strickland v. Barrett, 20 Pick. 415.

⁵ See Allison v. M'Cune, 15 Ohio, 726.

destroyed or injured the value of premises upon which he has a mortgage, the mortgage debtor being insolvent or unable to pay, which must be alleged and proved.¹ As where an assignee of a mortgagee brings an action against a purchaser from the mortgagor, for removing buildings from the premises after they had been advertised for sale under the power in the mortgage, and before the sale.²

§ 8. A second mortgagee, in possession of mortgaged chattels, though the prior mortgage is unsatisfied, and the legal title is in the first mortgagee, may maintain trespass or trover against a stranger for the wrongful taking of such chattels.³ So, if there are two mortgages upon land, neither of the mortgagees having entered, and the mortgagor, without the assent of either of them, cuts timber upon the land, after which the first mortgage is discharged, the second mortgagee may maintain trespass *qu. claus.* for cutting the timber.⁴ So A mortgaged to B, and then conveyed to C, taking back a mortgage from him for the purchase-money, which he assigned to D. After this, C remaining in possession, another person cut timber upon the land, under a license from him, without the assent of either of the mortgagees, and subsequently the debt due to B was paid. Held, that D, the assignee of the second mortgage, might maintain trespass *qu. claus.* against the party who cut the timber.⁵

§ 8 a. The mere possession by the mortgagor of personal property for more than a year after forfeiture of the mortgage, with the assent of the mortgagee, does not enable the former to give a good title in the absence of authority to sell. Nor does it make the mortgagee guilty of that species of negligence or misconduct which should estop him from afterwards asserting his title as against a third person, who voluntarily, but in ignorance of the true title, assists the mortgagee in the wrongful conversion of the property.⁶

§ 9. Where personal property was mortgaged to secure a note payable in six months, it being stipulated in the deed, that, until default in payment of the note, the mortgagor should retain possession; and the next day the property was attached and sold by an officer as the mortgagor's property, without pursuing the provisions of the statute upon the subject: held, case might be main-

¹ Gardner v. Heatt, 3 Denio, 232.

² Lane v. Hitchcock, 14 Johns. 213.

³ White v. Webb, 15 Conn. 302.

⁴ Sanders v. Reed, 12 N. H. 532.

⁵ Ibid.

⁶ Dudley v. Hawley, 40 Barb. 397.

tained by the mortgagee against the officer, before the note became due; and the mortgagee might recover the value of the property, not exceeding the amount of his claim against the mortgagor, with all the damages sustained in the vindication of his rights.¹

§ 10. Personal property, under mortgage, and in the possession of the mortgagee, was attached by a creditor of the mortgagor, and taken into the custody of the officer. The creditor then instituted proceedings against the mortgagor in the District Court, upon which he was adjudged a bankrupt, and the attaching officer was appointed his assignee. The property was subsequently sold by the assignee under a license from the District Court, and the proceeds distributed among the creditors of the bankrupt; and, upon the petition of the assignee, the mortgage was declared null and void by the District Court, as having been made in contravention of the bankrupt law, and ordered to be delivered up to the assignee to be cancelled. In an action of trespass by the mortgagee against the sheriff, for the act of his deputy in attaching the mortgaged property; it was held, that the action might be maintained, but that the defendant might show the subsequent proceedings in mitigation of damages, and thereby reduce them to nominal only.²

§ 11. Trover or trespass will lie by the mortgagee against the sheriff, and also against the plaintiff in the execution, who causes the seizure and sale of goods as the property of the mortgagor.³ So, although the mortgage stipulates that the mortgagor should retain possession until default of payment, but "if the same or any part thereof shall be attached at any time before payment by any other creditor or creditors of the mortgagor, then it shall be lawful for the mortgagee to take immediate possession of the whole of said granted property to his own use."⁴

§ 11 a. If a sheriff, who has attached mortgaged property on two writs, has been sued for the value thereof by the mortgagee, and has prevailed in his defence, on the ground that the demand made upon him was limited to property attached on one writ; the judgment in his favor is no bar to a subsequent action to recover the value of the same property, after a new demand; and, in such case, a new demand within twenty days after the rendition of the

¹ *Forbes v. Parker*, 16 Pick. 462.

² *Perry v. Chandler*, 2 Cush. 237.

³ *Sanders v. Vance*, 7 Monr. 209. See *McConeghy v. McCaw*, 31 Ala. 447.

⁴ *Welch v. Whittemore*, 25 Maine, 86.

judgment is within a reasonable time, if it appear that the situation of the defendant has not changed in the meantime.¹

§ 11 *b*. A mortgagee of personal property cannot sustain an action against an officer who has attached the same on two writs in favor of different plaintiffs against the mortgagor, if his demand for the payment of the money due to him was expressly limited to a single attachment.²

§ 11 *c*. The mortgagee of personal property, which has been attached on a writ against the mortgagor, cannot maintain an action against the officer for taking the same, if, in his statement of the debt for which the property is liable to him, delivered in pursuance of Gen. Sts. c. 123, § 63 (of Mass.), he included a sum which was not covered by his mortgage.³

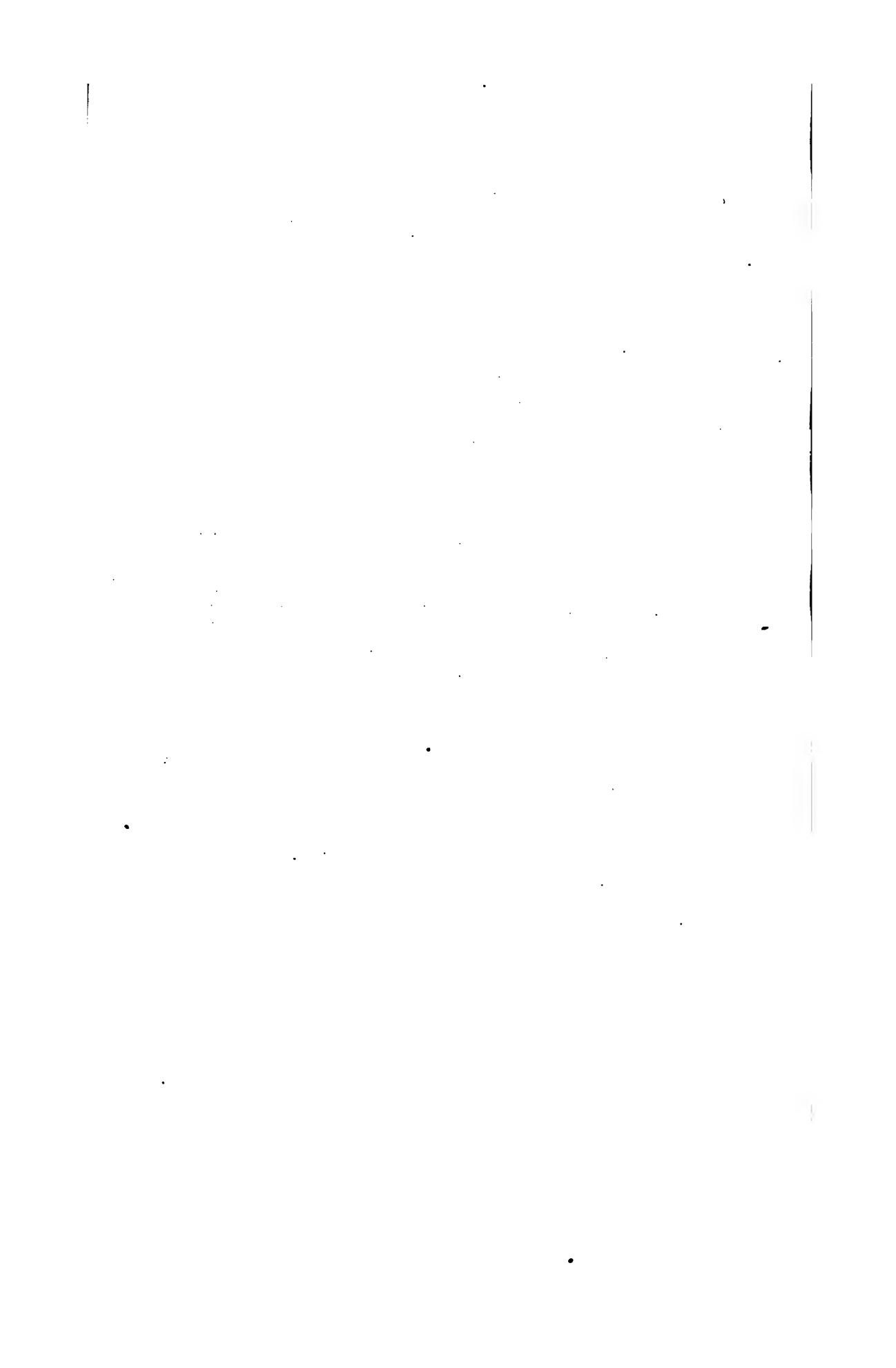
§ 12. A sale of personal property by a mortgagee before foreclosure is a conversion.⁴

¹ *Crosby v. Baker*, 6 Allen, 295.

² *Macomber v. Baker*, 3 Allen, 241.

³ *Hills v. Farrington*, 3 Allen, 427.

⁴ *Spaulding v. Barnes*, 4 Gray, 330.



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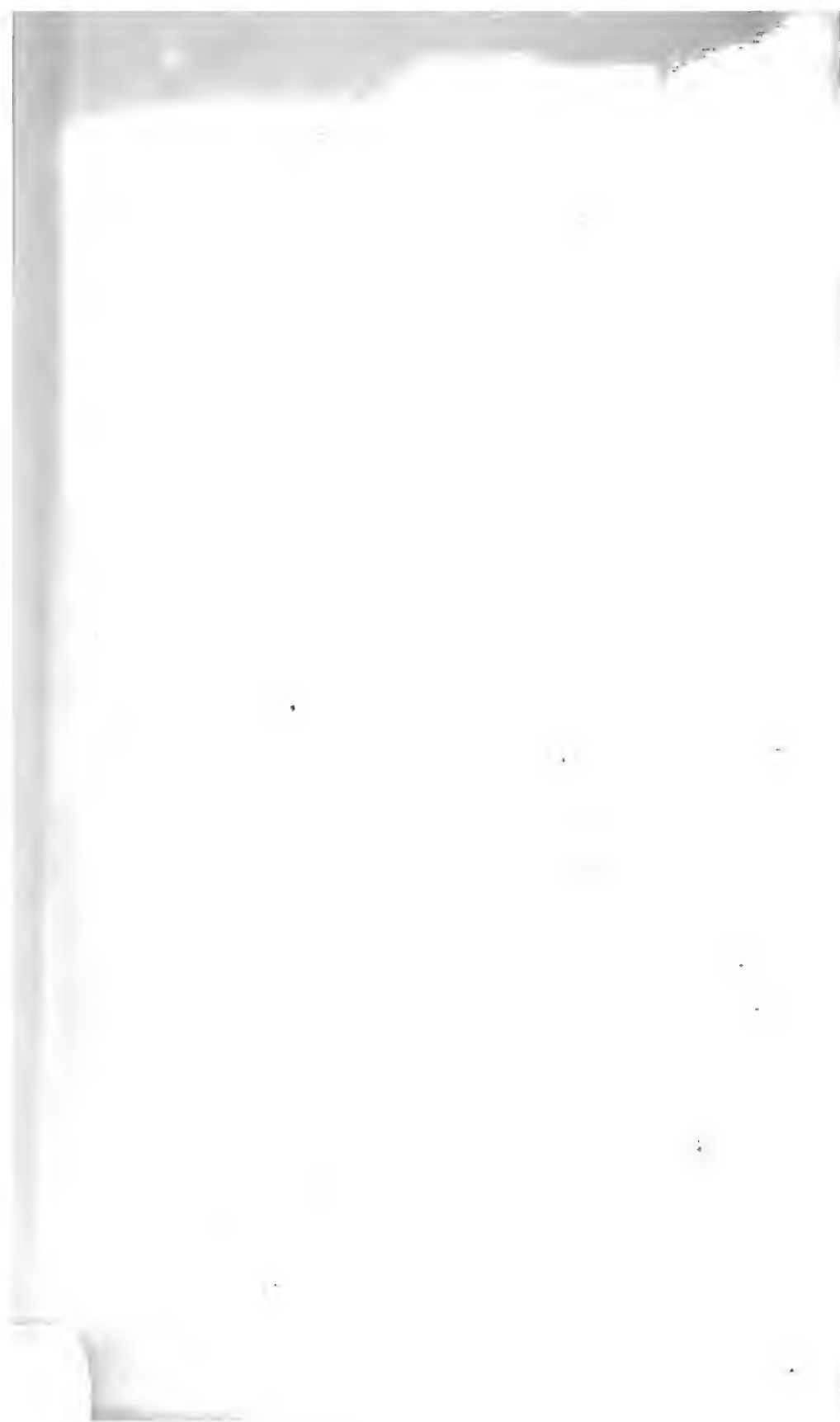
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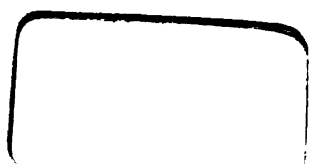
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